

# Crimmigration—Structural Tools of Settler Colonialism

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## I. INTRODUCTION

The systems of immigration and criminal law come together in many important ways, one of which being their role in instilling difference and undermining inclusion and integration. In this article, I will begin a discussion examining the concept of integration, simplistically described as inclusion into “American” life, not in the more traversed realm of citizenship, but in the context of crimmigration.<sup>1</sup> I posit that when considering the relationship between those who are formally considered integrated versus other, or outsider, which may or may not overlap with immigration status, the accepted concept of integration is misguided at best. Instead, if the concept of integration is framed as an epistemological tool of settler colonialism, the construction of race provides a more fruitful line of inquiry.

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<sup>1</sup> “Crimmigration” is the term coined by scholar Juliet Stumpf credited for consciously ushering in a new era of scholarship examining the intersections of criminal and immigration law. Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006). Scholars have built on and developed this theme. See, e.g., Ingrid V. Eagly, *Gideon's Migration*, 122 YALE L. J. 2282, 2282 (2013) (through the lens of criminal defense, examines the changing role of Gideon-appointed counsel to consider the “breadth and depth of immigration assistance that should develop under the defense umbrella”); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 B.Y.U. L. REV. 1457, 1459 (2013) (exploring the question of “Why, then, did crimmigration law not develop earlier?”) (contending that “[w]hen immigration became a national political concern for the first time since the civil rights era, policymakers turned to criminal law and procedure to do what race had done in earlier generations: sort the desirable newcomers from the undesirable”); Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L. J. 207 (2012) (examining false and dichotomous narrative of the “good” v. “bad” immigrant in the context of immigration adjudicators exercise of discretion); Christopher N. Lasch, *Redress in State Postconviction Proceedings for Ineffective Crimmigration Counsel*, 63 DEPAUL L. REV. 959 (2014); Rachel E. Rosenbloom, *The Citizenship Line: Rethinking Immigration Exceptionalism*, 54 B.C. L. REV. 1965, 1965 (2013) (propos[ing] a new understanding of “immigration exceptionalism,” exploring its implications for the rights of both citizens and noncitizens); Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO ST. L.J. 599 (2015).

There remains a divide in United States civil society, where people racialized<sup>2</sup> as nonwhite do not have the same lived experience as people racialized as white. Similarly, identity, or the perception of race, plays a role in the criminal justice system, wherein people racialized as nonwhite are disproportionately incarcerated. These two problems are mutually reinforcing—being poor increases the chances of being incarcerated, while being a person racialized as nonwhite is part of the equation in socio-economic standing and the likelihood of experiencing incarceration. Achieving socio-economic parity with people racialized as white has generally been considered a hallmark of what over-simplistically, and even dangerously, is characterized as integration.

These problems are replicated in and by the crimmigration system. Just as people racialized as nonwhite are more likely to be relatively socio-economically poor and more likely to have contact with the criminal justice system, immigrants racialized as nonwhite face these same challenges. The effects of racialization are significant, and the mechanisms purportedly designed to reverse, erase, or change these dynamics have failed immigrants and citizens racialized as nonwhite.

There is a longstanding myth that in a democratic society, such as the United States, everyone has the opportunity, the path, and maybe even a right to strive to and achieve integration.<sup>3</sup> Becoming a naturalized United States citizen is a symbol or marker of such achievement, although it is superficial and still limited with respect to full membership and integration. Citizenship does not elevate one above

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<sup>2</sup> Using the term “racialized” before the term “White” or “white” or “African-American,” “Latino,” etc., highlights the invisible discursive racialization process. See, e.g., Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401, 406 (2010) (examining “[r]acial territoriality” where “the state excludes people of color from—or marginalizes them within—racialized white spaces that have a racially exclusive history, practice, and/or reputation”); Peter Halewood, *Citizenship as Accumulated Racial Capital*, 1 COLUM. J. RACE & L. 313, 316 (2012) (using Marxist theory to explore “[r]acial capital” as “the material and economic value of whiteness”); Kevin R. Johnson, *The End of “Civil Rights” As We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1487 (2002) (addressing issue of immigration and civil rights considering the history of “[i]mmigrants from Mexico and Latin America” as consistently “racialized in the United States”); Ian F. Haney López, *Is the “Post” in Post-Racial the “Blind” in Colorblind?*, 32 CARDOZO L. REV. 807, 808 (2011) (examining racial mass incarceration and “argu[ing] that Obama’s post-racialism, rather than serving as a claim about our racial present, operates as a political or perhaps even an ideological approach toward the continuing astringent of race”); Devon W. Carbado & Rachel F. Moran, *The Story of Law and American Racial Consciousness: Building a Canon One Case at a Time*, 76 UMKC L. REV. 851, 883 (2008) (citing Devon W. Carbado, *Racial Naturalization*, 57 AM. Q. 633 (2005) (exploring the “social practice” of “Americaniz[ation]” including making one “socially intelligible via racial categorization”)).

<sup>3</sup> See Adjoa A. Aiyetoro, *Why Reparations to African Descendants in the United States Are Essential to Democracy*, 14 J. GENDER RACE & JUST. 633, 635–36 (2011) (discussing the need for reparations in a democratic society to maintain the promise of equality and equal opportunity); see also Joseph E. Stiglitz, *Equal Opportunity, Our National Myth*, N.Y. TIMES (Feb. 16, 2013), <https://opinionator.blogs.nytimes.com/2013/02/16/equal-opportunity-our-national-myth/?mtrref=www.google.com&gwh=A1E2B59713771E2CFC8DE52672049FE6&gwt=pay&assetType=opinion>.

the caste system of racialized hierarchy. The failure of integration is evidenced by the reality that immigrants and citizens racialized as nonwhite do not obtain the socio-economic successes of the dominant class.<sup>4</sup>

This article will propose that the promise of integration is a myth. Even more than a false promise, the concept of integration itself erases the historical racialized institutional infrastructure that is responsible for the falseness of this promise. Crimmigration is a piece of this larger puzzle.

Derek Bell's consideration of racial realism and theories of settler colonialism will be explored here to propose a theory of why the offer of integration is disingenuous and a promise never intended to be fulfilled.<sup>5</sup> Settler colonialism is a continuing form of nation building, whereby settlers fortify the dominant culture, removing and replacing communities with constructed ones.<sup>6</sup> (While racism predates colonialism, it plays a leading role in settler colonialism.) These methodologies also help explain why and how crimmigration is an extension of settler colonialism and is responsible for reinforcing racialized differences and the impossibility (and perhaps undesirability) of integration. While the theoretical tool of integration provides some insight into the relationship between racialization and the roles of the criminal justice and crimmigration systems, broadening the lens to examine crimmigration via the methodologies of racial realism and settler colonialism exposes the flaws in the integrationist paradigm.

Accordingly, the first section of this article will outline some of the markers of difference in civil society relative to understanding the differences between people racialized as white, and the contemporary settler colonial class and citizens and immigrants racialized as nonwhite. The second section will consider the ways in which the criminal justice system has come to signify a meaning making/epistemological system whereby "criminal" is code for people racialized as nonwhite. The third section will consider crimmigration's replication of the criminal justice system's racialization via legislative policy and juridical process. The fourth section will explore the frameworks of settler colonialism and racial realism. The fifth, and final section will critique the notion of integration using the methodologies of racial realism and settler colonialism to address the integrationist theory as an extension of structures intended to maintain existing power structures and subordination of people racialized as nonwhite irrespective of formal citizenship status.

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<sup>4</sup> See Tanya Golash-Boza, *Structural Racism, Criminalization, and Pathways to Deportation for Dominican and Jamaican Men in the United States*, SOC. JUST. VOL. 44, NOS. 2/3 (2017) (describing the structural racism of the crimmigration system and its impact on what she terms "incorporation" of Dominican and Jamaican men into the United States, and the limited attention these populations have received, as compared to criminalization of Latinx immigrants).

<sup>5</sup> See Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 374 (1992).

<sup>6</sup> WALTER L. HIXSON, *AMERICAN SETTLER COLONIALISM* 6–9 (2013).

### A. An Introduction—Integration (One Methodology)

Socio-economic and educational attainment are two common characteristics of what is often described as “integration.” The Merriam-Webster dictionary definition of integration is, in part, “the act or process or an instance of integrating: such as incorporation as equals into society or an organization of individuals of different groups (such as races).”<sup>7</sup> The term has some historical roots in the civil rights era as one response to segregation, and more recently it has been used in the context of immigrants, generally immigrants racialized as nonwhite.<sup>8</sup> The significance of this

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<sup>7</sup> MERRIAM-WEBSTER DICTIONARY, *Integration*, MERRIAM-WEBSTER.COM <https://www.merriam-webster.com/dictionary/integration> (last visited February 2, 2019). I refer to this definition primarily, because of its simplicity and superficiality where integration is used to measure demographic socio-economic incorporation into the prevailing political and economic system. However, immigration scholars have explored integration in more nuanced and critical ways in contexts ranging from the role of states and localities in integrating immigrants, as well as what it means to integrate. See, e.g., Hiroshi Motomura, *Who Belongs?: Immigration Outside the Law and the Idea of Americans in Waiting*, 2 UC IRVINE L. REV. 359, 361 (2012) (proposing that U.S. immigration law has not, but potentially should, treat immigrants as “Americans in waiting” to foster integration). Peter Markowitz uses the term “integration” to refer to “the fuller inclusion of undocumented immigrants into American society.” Peter L. Markowitz, *Undocumented No More: The Power of State Citizenship*, 67 STAN. L. REV. 869, 872–73 (2015). This author uses “integration” similarly, but with a focus on its limitations and shortcomings. Linda Bosniak is credited as one of the first immigration scholars to discuss integration in the context of immigration law, considered it in part, from the standpoint of incorporation into U.S. social and economic systems as participants. See Linda S. Bosniak, *Immigrants, Preemption and Equality*, 35 VA. J. INT’L L. 179, 187 (1994) (formalistically and pragmatically describing integration as state and local “[i]mmigration policy . . . largely left to states and localities and governs how immigrants are integrated into the U.S. economy and society,” and noting that the inverse is also relevant to integration—“social exclusion.”); see also David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583, 586 (2017) (describing “integrationist” policies as those extending benefits and a “general sense of belonging to immigrants” in the context of the federalism debate); see also EDIBERTO ROMAN, *CITIZENSHIP AND ITS EXCLUSIONS: A CLASSICAL, CONSTITUTIONAL, AND CRITICAL RACE CRITIQUE* (2010); Stella Burch Elias, *Comprehensive Immigration Reform(s): Immigration Regulation Beyond Our Borders*, 39 YALE J. INT’L L. 37, 41 (2014) (analyzing “the commonalities and differences between the various immigration federalism frameworks surveyed in three broad areas of immigration-related lawmaking” including “immigrant integration”); Cristina M. Rodriguez, *Guest Workers and Integration: Toward A Theory of What Immigrants and Americans Owe One Another*, 2007 U. CHI. LEGAL F. 219, 226 (2007) (discussing how guest worker programs as a threat to “immigrant integration” where “integration and assimilation” refer to “the process of incorporating immigrants into American life”); Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 581–605 (2008) (considering the role of state and local governments in integrating immigrants); Carrie L. Rosenbaum, *The Natural Persistence of Racial Disparities in Crime-Based Removals*, 13 U. ST. THOMAS L.J. 532, 532 (2017) (examining Obama-era policy changes to crime-based, sub-federal (state and local) immigration enforcement, in the context of the use of criminality as a determiner of desirability for noncitizens seeking integration into the United States polity).

<sup>8</sup> Wendy Brown-Scott, *Justice Thurgood Marshall and the Integrative Ideal*, 26 ARIZ. ST. L.J. 535, 537 (1994) (discussing the legacy of Thurgood Marshall in the context of integration explaining that the author used “integrative” and “integrationism” to describe the idea of according equality to racial and cultural minority group Americans through the process of increasing opportunities for racial

definition, and of using integration as a measure of societal success in achieving socio-economic, educational, or other equality, is problematic because it erases or makes invisible the systems of power that are responsible for the persistence of inequality and likelihood that achieving such equality is impossible.<sup>9</sup>

The concept of integration is a discursive and socio-political relic of civil rights era rhetoric and flawed equality ideology. Yet, for the purposes of talking about the very different real, tangible and lived experiences of immigrants and U.S. citizens racialized as nonwhite, considering discrepancies in socio-economic and educational experience provides some information that can be used either to explore future possibilities and limitations within the current system or to consider reasons for examining alternatives. Use of “integration” here is intended to do the latter, without affording it more credibility or merit than it deserves. The subtlety of the false promise of integration exposes deeper and more systemic problems.<sup>10</sup> The role of the criminal and crimmigration systems are also clarified from this perspective.

People racialized as nonwhite, both citizens and immigrants, have similarly depressed levels of socio-economic and educational attainment. This is no accident: the settler class, or people racialized as white, have created complex socio-political and economic systems that have enabled them to retain their status at the expense of people racialized as nonwhite.<sup>11</sup> The modern origins of socio-economic disparities between the settler class and people racialized as nonwhite are still as relevant today as they were nearly six decades ago, when Lyndon B. Johnson’s Kerner Commission issued a report recognizing that “White institutions created [the racial ghetto], White

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mixing with white Americans” resulting in the virtual assimilation of the minority group into the dominant culture and describing the contrary philosophy of the Black cultural nationalist movement in America, whereby cultural nationalism is defined by self-determination, or the ability to define oneself and to direct the development of one’s own community); *Id.* (citing CARTER G. WOODSON, *THE MIS-EDUCATION OF THE NEGRO* (First Africa World Press, Inc. ed 1990) (1933)); William E. Burghardt DuBois, *Does the Negro Need Separate Schools?*, 4 J. NEGRO EDUC. 328 (1935).

<sup>9</sup> See *infra* Section IV (discussing racial realism and settler colonialism); see also DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 185–86 (2007) (describing the flaws in defining equality by “definitional fiat” as proclaimed by desegregation campaigns and the courts where the U.S. government is both the “maker” and “guarantor” and determiner, I’d add, of whether equality has been achieved; and “equality by proclamation” not only gives the courts and institutions the power to determine whether it has been achieved, but also obscures the complexity of racial subordination).

<sup>10</sup> As a part of the rhetorical process of moving towards the settler colonial and racial realism framework, the relationship between “integration” and “assimilation” will also be explored in the next section.

<sup>11</sup> See *infra* Section IV. In keeping with settler colonial and critical race scholars, I use “settler class” to emphasize the intentional Anglo-American settler colonial active construction of Whiteness as superior, to protect their newly racialized privilege. See *infra* note 12 at 5 (citing HIXSON *supra* note 6, at 1–2). See generally AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* (2010); LORENZO VERACINI, *THE SETTLER COLONIAL PRESENT* (2015).

institutions maintain it, and White society condones it.”<sup>12</sup>

Today, “colorblind white dominance” is indicative of and responsible for normalizing difference and erasing the realities of racism.<sup>13</sup> Instead of questioning the systems of power, colorblind white dominance directs the attention, and the blame, to and on the individual, and to communities of color struggling under this invisible oppression. In spite of civil rights era measures presumably implemented to decrease racialized disparities, “[s]tark differences in income and wealth between whites and blacks remained almost unchanged since the 1970s,”<sup>14</sup> and the same is true for Latinos, and for all peoples of color, irrespective of immigration status. However, the mechanisms of colorblind white dominance have enabled a false narrative that equality has largely been achieved. Progress in reduction of race-based economic inequality is largely overestimated.<sup>15</sup>

In recent decades, the colorblind but racially coded War on Poverty has moved far away from a time where a national government institution, akin to the Kerner Commission, would publicly proclaim or acknowledge that white institutions still maintain and condone racial disparities.<sup>16</sup> The settler class benefits from the concealing of the role of the racialized institutions responsible for what is perceived as failed integration, by immigrants, or by U.S. citizens racialized as nonwhite. The criminal and crimmigration systems sustain the settler class’ role and position in society.

Racial gaps in income and earnings, with white households earning more than their black counterparts, persist. In the period between 1967 and 2015, the gaps have largely remained consistent or become more disparate.<sup>17</sup> In the last two decades,

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<sup>12</sup> Natsu Taylor Saito, *Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory*, 10 FLA. A & M U. L. REV. 1, 11 (2014) (citing REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 10–11 (1968)).

<sup>13</sup> IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 160–62 (2006) (the increasingly popular idea that racism and race are no longer relevant, such that “law no longer contributes to racial justice” because of the phenomena of “colorblind white dominance” and instead “legitimizes continued inequality.”).

<sup>14</sup> See Frank W. Munger & Carroll Seron, *Race, Law, and Inequality, 50 Years After the Civil Rights Era*, 13 ANN. REV. L. & SOC. SCI. 331, 332 (2017) (citing PATRICK SHARKEY, URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY (2013)).

<sup>15</sup> Michael W. Kraus, Julian M. Rucker & Jennifer A. Richeson, *PNAS Americans Misperceive Racial Economic Equality*, NAT’L. ACAD. OF SCI. (2015) (finding profound misperception of and unfounded optimism regarding societal race-based economic equality), <http://www.pnas.org/content/114/39/10324.abstract>; see Wendy Feliz, *What Views do Millennials Hold Around Immigration?*, AM. IMMIGR. COUNCIL (Feb. 12, 2018), <http://immigrationimpact.com/2018/02/12/views-millennials-around-immigration/> (discussing how millennials see immigrants as integrating, which may mean that they also do not view immigrants as experiencing race-based or other adverse discrimination).

<sup>16</sup> When referring to data from reports or referencing the work of others, this author will use the terminology they use, instead of the terms “people racialized as white” and “people racialized as nonwhite.”

<sup>17</sup> Kristen Bialik & Anthony Cilluffo, *6 Facts About Black Americans for Black History Month*, PEW RESEARCH CENTER (Feb. 22, 2017), [www.pewresearch.org/fact-tank/2017/02/22/6-facts-about-](http://www.pewresearch.org/fact-tank/2017/02/22/6-facts-about-)

“median black household wealth decreased by 75% to \$1,700, and Latino household wealth fell 50% to \$2,000,” while “median white household wealth rose 14% to \$116,800.”<sup>18</sup> According to the Census Bureau’s Current Population Survey, black families in America earn just \$57.30 for every \$100 in income earned by white families, and for every \$100 in white family wealth, black families hold just \$5.04.<sup>19</sup> Black and Hispanic men, since 1980, have not been able to improve their wages as relative to white men—put differently, black men earned the same 73% share of white men’s hourly earnings in 1980 as they did in 2015, and Hispanic men earned 69% of white men’s earnings in 2015 compared with 71% in 1980.<sup>20</sup>

If integration is determined by measuring other groups against the dominant settler class, immigrants are similarly not integrated. Immigrant integration, akin to black or African American integration, has been characterized as merging into an established societal structure. While limited, it is still quantifiable, and it provides insight into the systems that may foster or stymie integration, whether it is achievable, and whether it is even the right question to ask or framework to offer.

In the case of immigrants as compared to citizens, the failure to integrate has been rationalized as logical, or justifiable, not due explicitly or expressly to race; failure to integrate can be blamed on failed, more mutable, cultural assimilation.<sup>21</sup> “Foreignness,” described as an inability or unwillingness to shed cultural practices and change habits and methods of living, superficially appears as a reasoned and neutral explanation for not integrating or assimilating.<sup>22</sup> The supposed inability and

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black-americans-for-black-history-month/; see also Maury Gittleman & Edward N. Wolff, *Racial Differences in Patterns of Wealth Accumulation*, 39 J. OF HUM. RESOURCES 193 (2004).

<sup>18</sup> Antonio Moore, *What Will be Our Answer to the Disappearance of Black Wealth*, L.A. SENTINEL (Oct. 19, 2017), <https://lasentinel.net/what-will-be-our-answer-to-the-disappearance-of-black-wealth.html>.

<sup>19</sup> Emily Badger, *Whites Have Huge Wealth Edge Over Blacks (but Don’t Know it)*, N.Y. TIMES (Sept. 18, 2017), <https://www.nytimes.com/interactive/2017/09/18/upshot/black-white-wealth-gap-perceptions.html>.

<sup>20</sup> See Eileen Patten, *Racial, gender wage gaps persist in U.S. despite some progress*, PEW RESEARCH CENTER (July 1, 2016), <http://www.pewresearch.org/fact-tank/2016/07/01/racial-gender-wage-gaps-persist-in-u-s-despite-some-progress/>.

<sup>21</sup> Stuart Chinn, *Trump and Chinese Exclusion: Contemporary Parallels with Legislative Debates over the Chinese Exclusion Act of 1882*, 84 TENN. L. REV. 681, 715 (2017) (citing 37 CONG. REC. 2030 (1882) (describing assimilation compared to racist arguments from the legislative history of the 1882 Chinese Exclusion Act, see statement of Congressional Rep. Deuster that white immigrants were more assimilable because of “an intrinsic cultural compatibility between Europe and white America” in support of race-based exclusionary arguments applying to both Chinese immigrants, and African Americans); *Id.* at 705 (“the reliance upon culture in . . . legislative arguments result in comparative arguments that emphasized the inassimilability of Chinese immigrants in comparison to African-Americans” where African-Americans were represented as having stronger cultural ties with white Americans).

<sup>22</sup> *Id.* at 715 (discussing congressional representatives’ statements regarding Chinese immigrants in context of the 1882 Chinese Exclusion Act as inescapably “foreign.” And/but—slavery and Jim Crow segregation were also similarly, previously rationalized by a stated inability of

unwillingness to participate in a fixed yet indescribable American ideological cultural performative identity remains a rationale for the disparities between immigrants and citizens, even though data suggests that the disparities between Americans racialized as white, and immigrants *and* citizens racialized as nonwhite are similar. In other words, racialization is the factor responsible for attainment of education and accumulation of wealth, and not citizenship status. People racialized as white continue to have more wealth and education than either people racialized as black or Hispanic United States citizens, noncitizens, or immigrants.<sup>23</sup>

According to at least one study, racialized inequality and segregation appears to be experienced both by recent immigrants, and by U.S. citizens.<sup>24</sup> While immigrant integration, from the perspective of educational and economic attainment, has generally been considered separately from the racial education and wealth gaps of citizens racialized as nonwhite, the consistency of the disparity across citizenship status lines is not coincidental, and accordingly too often taken for granted. Factoring in the role of the criminal and crimmigration systems provides an even more complex and complete picture of the disparities and their origins.

According to the authors of an International Migration Review report (hereinafter the authors) studying economic and educational attainment amongst immigrants relative to U.S. citizens, citizenship status may play less of a role in integration, as compared to what the authors describe as “skin color discrimination.”<sup>25</sup> This is the case particularly with respect to black Americans, African immigrants, and what the report describes as Hispanic immigrants and Hispanic U.S. citizens.

The authors found that the difference in poverty rates between immigrant and native-born Hispanic Americans was negligible.<sup>26</sup> In other words, black and Hispanic poverty rates are similarly high.<sup>27</sup> Black immigrants’ poverty rate was

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Afrodescendants to culturally assimilate, even if they were later characterized as more assimilable than a politically and socially less-desired group at the time—new Chinese immigrants).

<sup>23</sup> Angela Hanks, Danyelle Solomon, and Christian E. Weller, *Systemic Inequality: How America’s Structural Racism Helped Create the Black-White Wealth Gap*, CTR. FOR AM. PROGRESS (Feb. 21, 2018), <https://www.americanprogress.org/issues/race/reports/2018/02/21/447051/systematic-inequality/>.

<sup>24</sup> See F.D. Bean, M.A. Leach, S.K. Brown, J.D. Bachmeier, & J.R. Hipp, *The Educational Legacy of Unauthorized Migration: Comparisons Across U.S.-Immigrant Groups in How Parents’ Status Affects Their Offspring*, 45 INT’L MIGRATION REV. 348 (2011) (noting that the groups compared when measuring wealth and education are “white” U.S. citizens, and African-Americans or Afrodescent peoples, and/or Latino/as, or, “white” U.S. citizens and immigrants, primarily focusing on Latina/o noncitizens. This article will focus on racialized black or African-Americans, and racialized Latina/os because of their particularly large representation in the criminal and crimmigration systems).

<sup>25</sup> MARY C. WATERS & MARISA GERSTEIN PINEAU, *THE INTEGRATION OF IMMIGRANTS INTO AMERICAN SOCIETY* (Mary C. Waters & Marisa Gerstein Pineau eds., 2015).

<sup>26</sup> WATERS, *supra* note 25.

<sup>27</sup> *Id.* at 285.



actually lower than that of native-born African Americans. The authors reported that immigrants with the “lightest skin color” earned 17 percent more than “those with the darkest skin color.”<sup>28</sup> Particularly important in understanding the significance of racialization, as compared to immigrant status or other assumptions about integration, was the finding that “skin color penalty did not disappear with time spent in the United States.”<sup>29</sup> Put differently, time in the United States, and in some cases, the transition to more formal membership in the political community, did not cure the inability of people racialized as nonwhite to achieve at levels comparable to U.S. citizens racialized as white, or even other immigrants racialized as white. While the authors suggest that children of Mexican and Central American immigrants progressed a great deal relative to their parents, they did not reach parity with the general population of white “native-born”<sup>30</sup> citizens.

Employment rates for second generation African-Americans were described as moving toward those of the general African-American native-born population, for whom higher education does not translate into higher employment rates.<sup>31</sup> While earnings improved relative to the native-born the longer they resided in the U.S., mobility was still influenced by racial and ethnic stratification.<sup>32</sup> Immigrants were found to experience a substantial “earnings penalty as skin color darkens,” earning assimilation being considerably slower for Hispanic (predominantly Mexican) immigrants than for other immigrants.<sup>33</sup>

The authors emphasized that “. . . if Latinos . . . continue to be racialized and discriminated against, this stereotyping may present a more formidable barrier to their successful integration in the future.”<sup>34</sup> Wealth or poverty, educational attainment, and employment are also related to rates of incarceration. Similar to the way citizenship status does not necessarily equate to higher rates of employment or lower rates of poverty for African-Americans compared to more recent African immigrants, the longer immigrants and their children reside in the United States, the greater their risk is for incarceration.<sup>35</sup>

Afrodescendent, Latino/a citizens and noncitizens are similarly impacted by facially colorblind institutions, as measured by comparable economic and educational attainment, and these discrepancies overlap with or are impacted by the

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<sup>28</sup> *Id.* at 270.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 271.

<sup>31</sup> *Id.* at 293.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 293–94.

<sup>34</sup> *Id.* at 326.

<sup>35</sup> Ruben G. Rumbaut & Walter Ewing, *The Myth of Immigrant Criminality and the Paradox of Assimilation*, AM. IMMIGR. COUNCIL, 2–11 (2007) (citing MICHAEL TONRY, *ETHNICITY, CRIME, AND IMMIGRATION: COMPARATIVE AND CROSS-NATIONAL PERSPECTIVES* (1997) (where crime problem reflects “not the foreign born but their children”) (discussing the “assimilation paradox” label).

criminal and crimmigration systems. The problems of unequal distribution of wealth and educational opportunity, and what they signify with respect to integration, are best not viewed in isolation, but within the context of their relationship to the inherently racialized criminal justice system.

*B. The Persistence of Racialized Inequality in a Formally Colorblind Society*

The criminal justice system largely grew out of the remnants of Jim Crow segregation, and it has continued to demonstrate results that reinforce the negative racialization of people as nonwhite. Michelle Alexander's characterization of the criminal justice system as the "New Jim Crow" references the longstanding racial bias in criminal policing, which precedes the formal end of slavery.<sup>36</sup> The bias is especially pronounced in the days of post-slave era Jim Crow segregation, and its persistence today is reflected in the disproportionate number of Indigenous, Afrodescendant, and Latina/o people in prisons, jails, or other forms of state penological surveillance or control.<sup>37</sup> The formal abolition of slavery in 1866, migration to Jim Crow segregation, and the resulting "Black Codes" designed to contain and control through criminalization<sup>38</sup> can be traced today to colorblind manifestations of inequality via infrastructures serving both to racialize, and to contain and control people racialized as nonwhite.<sup>39</sup> After Jim Crow segregation,

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<sup>36</sup> See Taja-Nia Y. Henderson, *Property, Penalty, and (Racial) Profiling*, 12 STAN. J. C.R. & C.L. 177 (February 2016) (suggesting that societal construction and associations of "blackness" with criminality developed during slavery in the early American South and focuses on what he describes as "mass incarceration" of slave property in penal facilities in spite of a lack of any cognizable connection to criminality or the criminal justice system, and the role this practice had on criminalization along lines of race).

<sup>37</sup> E. Ann Carson, *Prisoners in 2016*, U.S. DEP'T. OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STAT. (Jan. 2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf>; MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012).

<sup>38</sup> *Tales of Color and Colonialism*, *supra* note 12, at 41 (describing how black codes were laws that enabled policing of Afrodescendent peoples, former slaves, by "creat[ing] crimes of 'idleness, vagrancy, or 'disrespect' of White people.'").

<sup>39</sup> *Id.* at 30–31 (citing CHARLES R. EPP, STEVEN MAYNARD-MOODY & DONALD HAIDER-HARKEL, *PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP* 17–19 (2014)) (discussing traffic stops of African Americans and, to a lesser extent, other people of color); *see, e.g.*, SILENT COVENANTS, *supra* note 9, at 182 (describing socio-economic systems, including first-hired first-fired policies, that undercut gains by Blacks in the early 2000s); RUTH WILSON GILMORE, *GOLDEN GULAG: PRISON, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 87–90, 107–08, 110–11 (2007) (discussing California's development of a massive prison infrastructure in the 1980s and 1990s in incarcerating over 160,000 low wage African-American and Latino workers, and produced prisoners to fill newly built prisons by expanding criminalization); Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012) (considering the way in which colorblindness evolved to undermine the intent doctrine of equal protection with respect to detecting the mistreatment of non-Whites); Nancy A. Heitzeg, Ph.D., *On the Occasion of the 50th Anniversary of the Civil Rights Act of 1964: Persistent White Supremacy, Relentless Anti-Blackness, and the Limits of the Law*, 36 HAMLINE J. PUB. L. & POL'Y 54, 55–56 (2014) ("[r]acism, as both white supremacist/anti-black ideology and institutionalized

United States federal and local governments launched the wars on crime and drugs of the 1960s and 1970s, fueling mass incarceration of people racialized as nonwhite for low-level drug offenses.<sup>40</sup> The effects of the war on crime<sup>41</sup> and the ongoing (although temporarily reconsidered<sup>42</sup>) war on drugs,<sup>43</sup> and the subsequent war on terror,<sup>44</sup> justified as the only logical, and necessary response to the events of September 11, 2001,<sup>45</sup> have had a distinctly racialized dimension and consequences beyond stigmatization and incarceration. These modes of criminalization, in conjunction with the war on poverty, welfare reforms,<sup>46</sup> and contemporary economic

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arrangement, remains merely transformed with its systemic foundations intact” and the modern criminal justice system is a manifestation of formally race neutral subjugation of Blacks”); see also Frank Wilderson, *The Prison Slave as Hegemony's (Silent) Scandal*, 30 SOC. JUST. 2 (2003); ANGELA DAVIS, ARE PRISONS OBSOLETE? (2003); Angela Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLORLINES (Sept. 10, 1998), <https://www.colorlines.com/articles/masked-racism-reflections-prison-industrial-complex>.

<sup>40</sup> ALEXANDER, *supra* note 37, at 33.

<sup>41</sup> See, e.g., CHRISTIAN PARENTI, LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS 7 (2nd ed. 2000); Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1024 (2010) (considering mass incarceration in the Obama era and considering the thesis that “racialized mass incarceration stems from backlash to the civil rights movement” while “arguing for a renewed focus on racism, in particular on ‘post-racial racism’”).

<sup>42</sup> WHITE HOUSE, OFF. OF NAT’L DRUG CONTROL POL’Y (Apr. 17, 2002), <https://obamawhitehouse.archives.gov/realitycheck/ondcp/news-releases-remarks/obama-administration-releases-21st-century-drug-policy-strategy>; Alan Yuhas, *Obama’s Prison Reform Pitch to Highlight Soaring Costs of Incarceration*, THE GUARDIAN (July 14, 2015), <https://www.theguardian.com/us-news/2015/jul/14/obama-prison-reform-bipartisan-cost-race>.

<sup>43</sup> See, e.g., ALEXANDER, *supra* note 37, at 33.

<sup>44</sup> See, e.g., Nagwa Ibrahim, *The Origins of Muslim Racialization in U.S. Law*, 7 UCLA J. ISLAMIC & NEAR E. L. 121 (2009); see also Leti Volpp, *Impossible Subjects: Illegal Aliens and Alien Citizens*, 103 MICH. L. REV. 1595, 1598 (2005) (reviewing Mae Ngai’s book “Impossible Subjects” and considering relationships between “migrancy, nationalism and war” during World War II and the Cold War period, in light of the post 9/11 “war on terror”).

<sup>45</sup> See, e.g., Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 295 (2002) (describing how the war on terror targeted and primarily impacts/ed people perceived to be of Arab descent, but diminishing constitutional rights for all).

<sup>46</sup> Linda Burnham, *Welfare Reform, Family Hardship, and Women of Color*, 577 ANNALS AM. ACAD. POL. & SOC. SCI. 38 (2001) (“Women of color, overrepresented on the welfare rolls, are especially vulnerable to the negative impacts of welfare reform”); see also Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 792 (2003) (examining welfare reform in the context of neoliberal economics and noting that “the rise of neoliberal ideology in the last decades of the twentieth century has done more than throw extra dirt on the grave of constitutional social citizenship rights. Neoliberalism digs up a deeper challenge to social citizenship by undermining the legitimacy of nonconstitutional rights to economic security for workers, consumers, and families in poverty”); see also, *Id.* at 810 (citing DOROTHY E. ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 179 (2002)) (legal scholar Dorothy Roberts

policies,<sup>47</sup> have implications for continuing racialization and disparities. While some characterize this as a failing of the system and civil rights era reforms, others have suggested that the system is not broken, but operating as intended.<sup>48</sup> From classrooms to the workforce, “deep racial inequality persists in the United States,” even more than a half-century after the end of *de jure* segregation and passage of sweeping national civil rights legislation.<sup>49</sup>

Racial profiling in criminal law enforcement, and conscious and unconscious biases in the criminal justice system, contribute to the disproportionate incarceration of people racialized as nonwhite, and deportation of immigrants racialized as nonwhite.<sup>50</sup> Hyperincarceration has a disturbing, and predictable racial dimension;<sup>51</sup> by 1999, black people (constituting only 13% of the United States population’s drug users) were 74% of those imprisoned for drug-related offenses and 36% of the prison-industrial complex population.<sup>52</sup> While white people comprise 76.9% of the

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describing pre-welfare reform neo-liberal policies intended to “maintain a Black menial labor market caste in the South).

<sup>47</sup> Binyamin Applebaum, *Trump Tax Plan Benefits Wealthy, Including Trump*, N.Y. TIMES (Sept. 27, 2017), [https://www.nytimes.com/2017/09/27/us/politics/trump-tax-plan-wealthy-middle-class-poor.html?\\_r=0](https://www.nytimes.com/2017/09/27/us/politics/trump-tax-plan-wealthy-middle-class-poor.html?_r=0); Nicole Goodkind, *How Will Black and Latino People Fare Under Trump’s Tax Plan? It Doesn’t Look Good*, NEWSWEEK (Nov. 16, 2017), <http://www.newsweek.com/tax-plan-inequality-black-hispanic-trump-tax-713505>.

<sup>48</sup> See *infra* Section IV; Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 265 (2007) (“the system ‘brilliantly serves its intended purposes’”).

<sup>49</sup> Munger & Seron, *supra* note 14, at 332.

<sup>50</sup> *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, *supra* note 1, at 599 (“Latinos, over the years, have consistently represented over 90% of those in immigration detention, prosecuted for immigration violations, and removed as “criminal aliens.””); see also THE SENTENCING PROJECT, REDUCING RACIAL DISPARITY IN THE CRIMINAL JUSTICE SYSTEM: A MANUAL FOR PRACTITIONERS AND POLICYMAKERS (2000), [http://www.sentencingproject.org/doc/publications/rd\\_reducingracialdisparity.pdf](http://www.sentencingproject.org/doc/publications/rd_reducingracialdisparity.pdf); Christopher Ingraham, *Charting the Shocking Rise of Racial Disparity in Our Criminal Justice System*, WASH. POST. (July 15, 2014), <http://www.washingtonpost.com/news/wonkblog/wp/2014/07/15/charting-the-shocking-rise-of-racial-disparity-in-our-criminal-justice-system/>.

<sup>51</sup> Rebecca Sharpless, “Immigrants are Not Criminals”: Respectability, Immigration Reform, and Hyperincarceration, 53 HOUS. L. REV. 691, 711 (2016).

<sup>52</sup> *Tales of Color and Colonialism*, *supra* note 12, at 42 (citing PARENTI, *supra* note 41, at 238) (“Viewing settler policy in terms of the shift from an initial drive to create an ever-expanding slave labor force to the perception of black people as a “surplus” population to be contained and controlled lends consistency and coherence to a history that moves from slavery to convict labor to our present carceral state.”); see also TODD D. MINTON & DANIELA GOLINELLI, PH.D., *JAIL INMATES AT MIDYEAR 2013—STATISTICAL TABLES*, U.S. DEP’T OF JUST., BUREAU OF JUST. STAT. 7 Table 3 (May 2014), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4988>; see Ira Glasser, *American Drug Laws: The New Jim Crow*, 63 ALB. L. REV. 703, 719 (2000); ALEXANDER, *supra* note 37, at 95–137; see generally John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, The Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557 (1991) (government involvement in the influx

U.S. population, they are less than half of those imprisoned (as of 2017).<sup>53</sup> Latina/os are 17% of the population and 15% of those in prisons and jails.<sup>54</sup> Meanwhile, one out of every three black men, and one in six Latino men, are likely to be incarcerated in their lifetimes. White men stand a much lower (1 in 17) chance of being criminally incarcerated.<sup>55</sup> This hyperincarceration specifically targets Afrodescendent and Latina/o peoples.<sup>56</sup>

The prison system creates and sustains inequities and oppression of those incarcerated, even after their release. Electoral disenfranchisement,<sup>57</sup> lack of entitlement to certain public benefits, housing and employment restrictions, and the debt that can come with periods of incarceration or criminal penalties sustain an

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of drugs into Black communities); *see generally* ALFRED W. MCCOY, *THE POLITICS OF HEROIN: CIA COMPLICITY IN THE GLOBAL DRUG TRADE* (2d. 2003).

<sup>53</sup> U.S. CENSUS BUREAU, QUICKFACTS UNITED STATES (July 1, 2017), <https://www.census.gov/quickfacts/fact/table/US/PST045217>.

<sup>54</sup> JHEN ZENG, *JAIL INMATES IN 2016*, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT. 4 Table 3 (Feb. 2018), <https://www.bjs.gov/content/pub/pdf/ji16.pdf>.

<sup>55</sup> THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE 1 (2013), <http://sentencingproject.org/wp-content/uploads/2015/12/Race-and-Justice-Shadow-Report-ICCPR.pdf> (given “current trends” “one of every three black American males born today can expect to go to prison in his lifetime”); Vijay Prashad, *From Plantation to Penal Slavery*, 30 ECON. & POL. WKLY. 2237, 2241 (1995) (“The figures for incarcerated black males are remarkable: 23 per cent of all black males between the ages of 20 and 29 are in jail and there are more black men in jail than in college.”) (citing Marc Mauer & Tracy Huling, *Young Black Americans and the Criminal Justice System: Five Years Later*, THE SENTENCING PROJECT (Oct. 1, 1995)); *see also* David D. Cole, *Turning the Corner on Mass Incarceration?*, 9 OHIO ST. J. CRIM. L. 27, 29 (2011) (noting that our society would change the law if one third of young white men were in the criminal justice system). It is important to note that numbers of women of color in prison have been dramatically increasing in recent years as well; Sharpless, *supra* note 51, at 711 (citing Kimberlé Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418 (2012)) (Kimberlé W. Crenshaw cautions against a male-centric view of the problem of hyperincarceration); *see also* Allison S. Hartry, *Gendering Crimmigration: The Intersection of Gender, Immigration, and the Criminal Justice System*, 27 BERKELEY J. GENDER L. & JUST. 1, 14 (2012) (“Immigration and crime are both often examined as male issues.”); MINTON & GOLINELLI, *supra* note 52 (stating the population of incarcerated women increased 10.9 percent between mid 2010 and 2013, while the population of men fell by 4.2 percent).

<sup>56</sup> Yolanda Vázquez, *Crimmigration: The Missing Piece of Criminal Justice Reform*, 51 U. RICH. L. REV. 1093, 1147 (2017) (citing Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, 139 DAEDALUS 74, 78 (2010)).

<sup>57</sup> Brock A. Johnson, *Voting Rights and the History of Institutionalized Racism: Criminal Disenfranchisement in the United States and South Africa*, 44 GA. J. INT'L & COMP. L. 401, 403 (2016) (considering felon disenfranchisement where in “the United States, 5.85 million people were disenfranchised because of felony convictions as of 2010”); *see also* Brentin Mock, *The Racist History Behind Felony Disenfranchisement Laws*, DEMOS (Feb. 13, 2014), <http://www.demos.org/blog/2/13/14/racist-history-behind-felony-disenfranchisement-laws> [<https://perma.cc/7NBX-9AQJ>].

infrastructure of segregation and inequity.<sup>58</sup> The criminal justice system separates families, decreasing family incomes and support systems. This undermines parents' ability to support their children's already stymied public education<sup>59</sup> and adds many practical, economic, and emotional burdens of single-parenting or parenting by grandparents.<sup>60</sup> Children of incarcerated parents are more likely to be poor, in underfunded schools, and imprisoned in their lifetimes.<sup>61</sup> Incarceration begets more incarceration by disempowering those imprisoned, and failing to address the systemic socio-economic and racial inequities that resulted in incarceration.<sup>62</sup>

The rise of immigration enforcement and crimmigration has mirrored the racializing and otherizing function of the criminal justice system, which serves to reinforce the myth that integration is attainable for those who follow the rules of the system.

### *C. Crimmigration's Replication of Racial Disparities*

Within the last two decades, in part resulting from the 1996 immigration reforms, immigration law has come to look and feel more like criminal law. There has been an increase in the use of immigration detention or incarceration (formally considered "detention" when resulting from civil Immigration and Nationality Act "INA" statutes), expanded grounds for crime-based deportations and constriction of relief from removal, and collaboration between state and local criminal law enforcement and immigration authorities.<sup>63</sup> Crimmigration further replicates

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<sup>58</sup> ALEXANDER, *supra* note 37, at 35–58; *see also* Bruce Western & Christopher Wildeman, *The Black Family and Mass Incarceration*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 221 (2009) (considering continued racial disparities in poverty resulting from mass incarceration and failure of civil rights reforms describing the "Daniel Patrick Moynihan's 1965 report, *The Negro Family: The Case For National Action*, as a "lost opportunity").

<sup>59</sup> Ronald Brownstein, *The Challenge of Educational Inequality*, THE ATLANTIC (May 19, 2016), <https://www.theatlantic.com/education/archive/2016/05/education-inequality-takes-center-stage/483405/>.

<sup>60</sup> *See, e.g.*, Alysse ElHage, *The Complicated Problems of Children with Incarcerated Parents*, INST. FOR FAM. STUD. (May 9, 2016), <https://ifstudies.org/blog/the-complicated-problems-of-children-with-incarcerated-parents>; *see also*, *Impact of Incarceration on Caregivers*, PRISON FELLOWSHIP, <https://www.prisonfellowship.org/resources/training-resources/family/ministry-basics/impact-of-incarceration-on-caregivers/>.

<sup>61</sup> *See* Amy Alexander, *Why Children with Parents in Prison are Especially Burdened*, THE ATLANTIC (Dec. 14, 2015), <https://www.theatlantic.com/politics/archive/2015/12/why-children-with-parents-in-prison-are-especially-burdened/433638/>.

<sup>62</sup> *See, e.g.*, Angélica Cházaro, *Challenging the "Criminal Alien" Paradigm*, 63 UCLA L. REV. 594 (2016); Joseph E. Kennedy, *The Jena Six, Mass Incarceration, and the Remoralization of Civil Rights*, 44 HARV. C.R.-C.L. L. REV. 477, 478 (2009) (examining mass incarceration as a civil rights issue).

<sup>63</sup> *See* Stumpf, *supra* note 1, at 376; *see also*, *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, *supra* note 1, at 640–50 (evaluating the evolution of the conception of the "criminal alien" under the U.S. immigration laws); *see* Cházaro, *supra* note 62;

racialized harms of both the criminal and immigration systems.

The landscape responsible for the disparate racialized effects of the criminal justice system's migration into the criminal-immigration, or crimmigration system, is vast and complex.<sup>64</sup> Federal immigration enforcement has become a "criminal removal system";<sup>65</sup> a deportation pipeline, where race and class influence which individuals are deemed criminal immigrants, and where race and class matter as much as, or more than, actual culpability for violating criminal laws.<sup>66</sup> The federal government, states and localities, and the judicial system have all played a part in the formation of crimmigration, resulting in disruption to families and communities, analogous to the criminal justice system with exponential repercussions. However,

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Hernández, *supra* note 1, at 1461–67 (examining the disparate racial impacts of the criminal justice system via federal immigration enforcement); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 83–86 (2005); Katarina Ramos, *Criminalizing Race in the Name of Secure Communities*, 48 CAL. W. L. REV. 317, 337–38 (2012) (criticizing the racial impacts of the operation of the Secure Communities program); Carrie L. Rosenbaum, *The Role of Equality Principles in Preemption Analysis of Sub-Federal Immigration Laws: The California TRUST Act*, 18 CHAP. L. REV. 481, 492–98 (2015) (considering the role of race in Secure Communities program and the defensibility of immigrant protective policies on the basis of equality principles rooted in federal civil rights law and principles); Maureen A. Sweeney, *Shadow Immigration Enforcement and Its Constitutional Dangers*, 104 J. CRIM. L. & CRIMINOLOGY 227 (2014) (analyzing the increasingly common phenomenon of state and local law enforcement involvement in federal immigration enforcement and the resulting negative impacts on minority communities).

<sup>64</sup> See, e.g., Hernández, *supra* note 1; César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1360–82 (2014); Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 998 (2016) (focusing deportation efforts on noncitizens who encounter a criminal justice system well-known for racial bias has had racially disparate impacts on the removal); Rachel E. Rosenbloom, *Policing Sex, Policing Immigrants: What Crimmigration's Past Can Tell Us About Its Present and Its Future*, 104 CAL. L. REV. 149, 150 (2016) (crimmigration as "the product of shifts within both policing and the deportation systems that have rendered many more people vulnerable to the intersection of the two" resulting in a racialized immigration enforcement system); *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, *supra* note 1, at 640; Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L.J. 639, 666 (2011) (examining the disparate deportation of Latinos; in 2009 comprising 94 percent of deportations); see also Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 647–49 (2012); Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L. Q. 675 (2000); Juliet P. Stumpf, *Civil Detention and Other Oxymorons*, 40 QUEEN'S L.J. 55, 68–72 (2014).

<sup>65</sup> Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge As Immigration Judge*, 51 EMORY L.J. 1131, 1140 (2002).

<sup>66</sup> See Sharpless, *supra* note 51, at 765 (citing Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 43 (2010)) (Anil Kalhan has argued that "excessive immigration detention practices have evolved into a quasi-punitive system of *immmarceration*."); see also Cházaro, *supra* note 62, at 638 (describing hypercriminalization of those that would not have qualified for the Obama Administration DAPA program via the "deportation pipeline").

in the world of crimmigration, the incarcerated person's absence is often permanent, when they are removed via deportation.<sup>67</sup>

Racial profiling and racialized crime control systems disproportionately impact noncitizens of color.<sup>68</sup> César Cuauhtémoc García Hernández suggests that crimmigration was a response to the civil rights movement just as criminality is a well-established proxy for race.<sup>69</sup> The migration of racial disparities manufactured by the criminal justice system, and imported to the criminal-immigration system has resulted in disproportionate arrest, detention and deportation of people from Central America and Mexico, as well as Jamaicans and Dominican Republic nationals<sup>70</sup>, or people racialized as nonwhite. This constitutes "proxy criminalization" and functions to "manag[e] migration through crime."<sup>71</sup>

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<sup>67</sup> See Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1291 (2010) ("revealing ways in which the criminal system treats noncitizens in practice" and analyzing "normative questions regarding . . . interaction between the immigration and criminal systems").

<sup>68</sup> See, *The Case Against Race Profiling in Immigration Enforcement*, *supra* note 64 (In a symposium considering the 20<sup>th</sup> anniversary of the Supreme Court's decision in *Whren v. United States*, 517 U.S. 806 (1996), scholar and dean Kevin Johnson examines criminalization of immigrants of color and the under-examined role of race in criminalization of immigration enforcement).

<sup>69</sup> Hernández, *supra* note 1, at 1459.

<sup>70</sup> See Golash-Boza, *supra* note 4 (highlighting the disproportionate criminal arrest and deportation of "Black immigrant youth," particularly Jamaican and Dominican Republic immigrants, and the role of racialization in criminalization across lines of citizenship and serving as an impediment to "incorporation" as well as the state's role in using punitive institutions to control the poor).

<sup>71</sup> See Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 135 (2009) (moving past examination of incorporation of criminal law methodologies into immigration law to consider the ways in which criminal prosecutions have been used to manage migration including the evolution or dissolution of criminal law protections—criminal investigation and adjudication in the process, and "relaxed procedural norms of civil immigration proceedings entering or influencing criminal adjudications"); Annie Lai, *Confronting Proxy Criminalization*, 92 DENV. U. L. REV. 879, 879 (2015) (examining the phenomena and significance of criminalization of immigrants through state laws, calling indirect criminalization of immigrants' undocumented status as "proxy" criminalization where state and local governments use police powers to target undocumented communities, substantially impacting communities of color (racial note my addition)) (emphasizing that "[u]ltimately, proxy criminalization of migration affects more than just immigrants and their families. In the case of driver's license laws, internalized associations have taken on a racialized image—the prototypical traffic misdemeanor becomes a Latino/a immigrant who is driving without a license") (citing Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dept. of Justice, to Joseph Maturo, Jr., Mayor, Town of East Haven 8–10 (Dec. 19, 2011), [http://www.justice.gov/crt/about/spl/documents/easthaven\\_findletter\\_12-19-11.pdf](http://www.justice.gov/crt/about/spl/documents/easthaven_findletter_12-19-11.pdf) (describing police department's practice of patrolling locations where Latinos congregated and following vehicles with a Latino driver in an attempt to enforce immigration laws)); Letter from Thomas E. Perez, Assistant Attorney Gen., U.S. Dept. of Justice, to Clyde B. Albright, Alamance Cnty. Att'y, et al. 4–5 (Sept. 18, 2012), <http://www.justice.gov/iso/opa/resources/171201291812462488198.pdf> (describing Alamance County Sheriff's Office's discriminatory traffic enforcement and checkpoint practices and referring to one deputy who said "he stopped a Latino man because 'most of them drive without licenses'" (quoting Alamance County Sheriff's Office deputy); see also Ginger Thompson & Sarah Cohen, *More Deportations Follow Minor Crimes, Data Shows*, N.Y. TIMES (Apr. 6, 2014) (finding that two-thirds of the nearly two million deportations during the Obama Administration involved individuals who had



Crimmigration is a particularly insidious modern manifestation of a historically racially biased immigration system.<sup>72</sup> More than 95 % of the noncitizens removed annually from the United States are from Mexico and Central America, whereas Latina/os comprise less than half of the nation's immigrant population.<sup>73</sup> Racially disparate removals of Latina/os may be disproportionate when compared to Mexican and Central American nationals living in the U.S., but is consistent with mainstream rhetoric,<sup>74</sup> and the widespread but erroneous belief that Mexican immigrants, as a group, are predisposed to criminal activity, when immigrants are actually less likely to commit crimes than native-born citizens.<sup>75</sup> This is enabled by the analogous

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only a minor traffic violation, or no criminal record at all); Jamie Longazel, *Moral Panic as Racial Degradation Ceremony: Racial Stratification and the Local-Level Backlash against Latino/a Immigrants*, 15 PUNISHMENT & SOC'Y 96, 96 (2013) (describing passage of Hazelton ordinance as perpetuating racial stratification); see, e.g., David F. Forte, *Spiritual Equality, the Black Codes and the Americanization of the Freedmen*, 43 LOY. L. REV. 569, 600–01 (1998) (citing Jorge M. Chavez & Doris Marie Provine, *Race and the Response of State Legislatures to Unauthorized Immigrants*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 78, 78–92 (2009) (finding that conservative citizen ideology appears to be the factor that most drives anti-immigrant state legislation).

<sup>72</sup> See, e.g., STEVEN W. BENDER, *MEA CULPA: LESSONS ON LAW AND REGRET FROM U.S. HISTORY* (2015) (discussing ethnic and racial bias in origins of immigration law); Gabriel J. Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 HARV. C.R.-C.L. L. REV. 1, 2 (2002) (examining the system of laws that began to develop in 1875 to enforce the federal policy of Asian exclusion); Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1, 3 (2009) (explaining while the 1965 INA changes, as a “by-product of the 1960s civil-rights movement, abolished the facially discriminatory national-origins quotas system,” “race and class interact synergistically in the U.S. immigration laws and their enforcement”); Margaret H. Taylor & Kit Johnson, *“Vast Hordes . . . Crowding in Upon Us”: The Executive Branch’s Response to Mass Migration and the Legacy of Chae Chan Ping*, 68 OKLA. L. REV. 185, 185 (2015) (considering modern immigration detention in the context of the 125-year anniversary of the Chinese Exclusion Case).

<sup>73</sup> See Kevin R. Johnson, *Racial Profiling in the War on Drugs Meets the Immigration Removal Process: The Case of Moncrieffe v. Holder*, 48 U. MICH. J.L. REFORM 967, 976–77 (2015) (citing sources with statistical data supporting this assertion); see also, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, *supra* note 64, at 998.

<sup>74</sup> See, e.g., Julianne Hing, *Immigrants aren’t just drug dealers and rapists anymore—now they’re murders, too*, THE NATION (July 22, 2016), <https://www.thenation.com/article/trump-warns-of-immigrants-once-merely-drug-dealers-and-rapists-now-also-murderers/>; ‘Drug dealers, criminals, rapists’: What Trump Thinks of Mexicans, BBC NEWS (Aug. 31, 2016), <http://www.bbc.com/news/av/world-us-canada-37230916/drug-dealers-criminals-rapists-what-trump-thinks-of-mexicans>.

<sup>75</sup> *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, *supra* note 64, at 999 (citing ANN COULTER, ¡ADIOS, AMERICA!: THE LEFT’S PLAN TO TURN OUR COUNTRY INTO A THIRD WORLD HELLHOLE (2015)) (contending that Mexican immigrants pose a greater public safety risk to the United States than Muslim terrorists); Raf Sanchez, *Donald Trump Uses Killing of US Woman by Illegal Immigrant to Justify Mexican “Rapists and Criminals” Claim*, TELEGRAPH (July 6, 2015), <http://www.telegraph.co.uk/news/worldnews/us-election/11721409/Donald-Trump-uses-killing-of-US-woman-by-illegal-immigrant-to-justify-Mexican-rapists-and-criminals-claim.html>; see generally Mary Romero, *Racial Profiling and Immigration Law Enforcement: Rounding Up of Usual Suspects in the Latino Community*, 32 CRITICAL

problem of a prison system filled disproportionately by people racialized as nonwhite, who are not more likely to commit crimes than people racialized as white, but who *are* more likely to be arrested, prosecuted, and incarcerated.<sup>76</sup>

This contemporary picture resonates in pre-civil rights era times, with politics arising from nativism, yet with more facially race-neutral but disparate impacts, as well as state and local laws intending to achieve voluntary deportation.<sup>77</sup> A confluence of state and federal legislative, judicial, and socio-political factors, particularly within the last three decades, have contributed to this parallel pipeline. The Supreme Court's sanctioning of implicitly racialized criminal law enforcement, combined with the permissibility of use of race (as "a factor") in immigration enforcement<sup>78</sup> and cooperation between federal immigration authorities and state and local, or sub-federal, law enforcement has had a significantly racially disparate impact on noncitizens racialized as nonwhite.<sup>79</sup>

Criminalization of peoples racialized as nonwhite through the prison-industrial complex<sup>80</sup> and crimmigration is one of the many reasons for the catch-22 or chicken and egg problem of alleged inability to assimilate. The "racialization of migrant Others" that occurs via crimmigration can be characterized as a strategy to

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SOC. 447 (2006) (considering the impacts on the law and its enforcement of the popular stereotype that Latina/os are criminals); Deborah Weissman, *The Politics of Narrative: Law and the Representation of Mexican Criminality*, 38 FORDHAM INT'L L.J. 141 (2015) (analyzing in detail the influence of stereotypes of Mexican criminality on American law and policy).

<sup>76</sup> See generally ALEXANDER, *supra* note 37.

<sup>77</sup> See Michele Waslin, *Discrediting "Self-Deportation" as Immigration Policy*, IMMIGR. POL'Y CTR. 2-4 (2012), [http://www.immigrationpolicy.org/sites/default/files/docs/Waslin\\_-\\_Attrition\\_Through\\_Enforcement\\_020612.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/Waslin_-_Attrition_Through_Enforcement_020612.pdf); for a critique of enforcement through attrition, see Mary Fan, *Rebellious State Crimmigration Enforcement and the Foreign Affairs Power*, 89 WASH. U.L. REV. 1269 (2012) (arguing "that the caste-carving approach of the 'attrition through enforcement' multi-front attack strategy behind the laws contravenes national immigration enforcement policy and strains foreign relations").

<sup>78</sup> *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975) (permitting use of "Mexican appearance" as a factor used by authorities in enforcing immigration law); see Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1007 (2010) (considering the Supreme Court's rulings in criminal and immigration law cases concerning use of racial profiling); see also Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543 (2011) (examining the Fourth Amendment in the context of undocumented cases); *The Case Against Race Profiling in Immigration Enforcement*, *supra* note 64, at 688-716 (documenting prevalent claims of racial profiling in immigration enforcement).

<sup>79</sup> See, e.g., Hernández, *supra* note 1, at 1461-67 (assessing the disparate racial impacts of the criminal justice system on contemporary immigration enforcement); David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 157 (2012) (describing the "rise of an intertwined regime of "crimmigration" law . . . attributed to some combination of nativism, overcriminalization"); *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, *supra* note 1, at 599. ("Latinos . . . have consistently represented over 90% of those in immigration detention, prosecuted for immigration violations, and removed as 'criminal aliens.'").

<sup>80</sup> ARE PRISONS OBSOLETE?, *supra* note 39.

subordinate peoples of color, not only “eras[ing] their particular histories and identities” but “replacing them with artificially constructed identities” that are then used to both “reinforce a multi-layered racial hierarchy” and make this very process invisible.<sup>81</sup> This racial hierarchy is responsible for the lack of equity in opportunity, the inability to be fully eligible for and included in the “settler class,” and the making of race to protect racial privilege codified as Whiteness.<sup>82</sup>

Contemporary federal immigration law and policy, criminal and immigration racial profiling jurisprudence, and criminalization of migration have converged to signify new and additional ways to contain and control.

### 1. The Legislative and Federal Policy Components of Crimmigration

The 1996 federal immigration reforms<sup>83</sup> were one of several hallmarks of an emphasis on harsher immigration laws and the expansion of the crimmigration system.<sup>84</sup> That legislation expanded crimes triggering deportation or inadmissibility, expanded mandatory detention, and decreased judicial discretion, as well as relief from deportation.<sup>85</sup> Those measures, combined with the increased privatization of immigration prisons,<sup>86</sup> and the congressionally created detention bed mandate,

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<sup>81</sup> *Tales of Color and Colonialism*, *supra* note 12, at 60.

<sup>82</sup> *See generally*, *Tales of Color and Colonialism*, *supra* note 12, at 58; *see also* GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS* (1998); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993); *see also* Natsu Taylor Saito, *Race and Decolonization: Whiteness as Property in the American Settler Colonial Project*, 31 HARV. J. RACIAL & ETHNIC JUST. 31 (2015).

<sup>83</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, 110 Stat. 3009 (1996).

<sup>84</sup> Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1633 (2010) (citing Jeff Yates, Todd A. Collins & Gabriel J. Chin, *A War on Drugs or a War on Immigrants? Expanding the Definition of “Drug Trafficking” in Determining Aggravated Felon Status for Noncitizens*, 64 MD. L. REV. 875, 878–79 (2005)) (highlighting certain inequities of the sentencing system).

<sup>85</sup> *See Managing Migration Through Crime*, *supra* note 71, at 135–56 (describing “three distinct trends” that comprise “crimmigration”—“the increasingly harsh criminal consequences attached to violations of laws regulating migration, the use of removal as an adjunct to criminal punishment in cases involving noncitizens, and the rising reliance on criminal law enforcement actors and mechanisms in civil immigration proceedings.”); Hernández, *supra* note 1, at 1461–67 (assessing the disparate racial impacts of the criminal justice system on contemporary immigration enforcement); Miller, *supra* note 63, at 83–86; Sklansky, *supra* note 79, at 157 (discussing the role of the 1996 reforms in giving rise to crimmigration, and the accountability concerns with merging of immigration enforcement and criminal justice); Stumpf, *supra* note 64.

<sup>86</sup> *See* César Cuauhtémoc García Hernández, *Abolishing Immigration Prisons*, 97 B.U. L. REV. 245, 246 (2017) (the first legal scholar to argue that “immigration imprisonment is inherently indefensible and should be abolished”); César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CAL. L. REV. 1449, 1450 (2015) (examining legal and policy choices that explain imprisonment as a significant component in immigration law enforcement and proposing a reversal in policy); Jennifer Chacon, *Privatized Immigration Enforcement*, 52 HARV. C.R.-C.L. L.

coalesced to have a drastic impact on noncitizens racialized as nonwhite.<sup>87</sup>

Compounding federal immigration enforcement efforts with a crimmigration tinge, within the last decade in particular, states and localities have become active participants in immigration legislation to supplement federal immigration and crimmigration enforcement efforts, as well as in order to counter federal measures by attempting to provide increased rights and protections to noncitizens and their families.<sup>88</sup> The attrition via enforcement philosophy is embodied in Arizona's largely judicially invalidated S.B.1070 (one of hundreds of such measures propagated since approximately 2010),<sup>89</sup> which had provisions encouraging state and local law enforcement cooperation with federal immigration enforcement agents, including constitutionally questionable<sup>90</sup> incentivizing of racial profiling. The Supreme Court, however, did not invalidate the particular provision, Section

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REV. 1, 36 (2017) (examining the privatization of immigration detention in the context of a "carceral system rooted in the illegitimate and racialized commodification of human beings").

<sup>87</sup> See, *Crimmigration: The Missing Piece of Criminal Justice Reform*, *supra* note 56, at 1112 (examining the "impact that the incorporation of migration enforcement has had on the criminal justice system" exacerbation of "pre-existing problems within it" particularly "finely targeted" Latino/as).

<sup>88</sup> See, e.g., PRATHEEPAN GULASEKARAM & S.K. RAMAKRISHNAN, *THE NEW IMMIGRATION FEDERALISM IN THE UNITED STATES* (2015); Barbara E. Armacost, "Sanctuary" Laws: *The New Immigration Federalism*, 2016 MICH. ST. L. REV. 1197 (2016) (widespread resistance to immigration enforcement partnerships is a state- and local-inspired reaction to the serious, if unintended consequences of localized immigration policing); Michael A. Olivas, *Immigration-Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, 2007 U. CHI. LEGAL F. 27, 28 (2007); *The Role of Equality Principles in Preemption Analysis of Sub-federal Immigration Laws*, *supra* note 63, at 483, 523; Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1558 (2008) ("crimmigration law has transformed immigration law from something the federal government is uniquely competent to control—foreign policy—to something states are experts in—law enforcement." Using "history, law, and policy to critique the growing trend toward subnational reliance on criminal law to control immigration"); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001) (with uncanny foresight, Wishnie began the examination of the state-federal relationship considering the problem of denial of benefits to legal immigrants under the 1996 Welfare Reform Act); see also Jennifer M. Chacón, *The Transformation of Immigration Federalism*, 21 WM. & MARY BILL RTS. J. 577 (2012); Gabriel J. Chin & Marc L. Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. 251 (2011); Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609 (2012).

<sup>89</sup> See Ian Gordon & Tasneem Raja, *164 Anti-Immigration Laws Passed Since 2010? A MoJo Analysis*, MOTHER JONES (March/April 2012), <https://www.motherjones.com/politics/2012/03/anti-immigration-law-database/>; *Anti-Illegal Immigration Laws in States*, N.Y. TIMES (Apr. 22, 2012), <https://archive.nytimes.com/www.nytimes.com/interactive/2012/04/22/us/anti-illegal-immigration-laws-in-states.html?searchResultPosition=1>.

<sup>90</sup> See, e.g., Christopher N. Lasch, *Preempting Immigration Detainer Enforcement Under Arizona v. United States*, 3 WAKE FOREST J.L. & POL'Y 281, 283 (2013) (contending that states' role in enforcing immigration law pursuant to immigration detainers may be limited by the constitution).

2(B) most potentially responsible for incentivizing racial profiling.<sup>91</sup> Years later, other states have created or are pursuing laws replicating Section 2(B), as well as attempting to penalize sanctuary jurisdictions that attempt to limit cooperation with federal immigration enforcement efforts.<sup>92</sup> Sub-federal measures encouraging collaboration with federal immigration enforcement in measures like Section 2(B) seem to be a manifestation of “proxy . . . vent[ing]” of “resurgent racialized anxieties.”<sup>93</sup>

Some of these pro-enforcement sub-federal policies are a condoning response to the Department of Homeland Security’s Secure Communities program, initiated in 2008.<sup>94</sup> The Department of Homeland Security’s criminal immigration enforcement program, Secure Communities, facilitates increased collaboration

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<sup>91</sup> *Arizona v. United States*, 567 U.S. 387 (2012); *see, e.g.*, Kristina M. Campbell, (*Un*) *Reasonable Suspicion: Racial Profiling in Immigration Enforcement After Arizona v. United States*, 3 WAKE FOREST J.L. & POL’Y 367 (2013) (the “reasonable suspicion” requirement of S.B. 1070’s Section 2(B), and argues that enforcement of this provision will give rise to stops, detentions, and arrests based on constitutionally impermissible factors such as race, color, and ethnicity); *see also* Gabriel J. Chin et. al., *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47, 49 (2010) (“This Commentary answers central questions that have led to great confusion in public and indeed even in scholarly discourse. Does S.B. 1070 authorize racial profiling? (It does). Does S.B. 1070 require racial profiling? (Again, it does in text, but it may not in administrative policy). Does S.B. 1070 authorize arrest or detention based on race alone? (No). May Arizona police under S.B. 1070 arrest or stop based on undocumented status alone? (Probably). Are people in Arizona now required to carry identification? (Not generally). How can police tell if someone is undocumented? (It is a contextual evaluation). What is the purpose of Arizona making state crimes based on violations of federal law? (“Attrition through enforcement”). Does S.B. 1070 simply replicate and enforce federal immigration law? (To some extent yes, but to a greater extent no.)”); Marjorie Cohn, *Racial Profiling Legalized in Arizona*, 1 COLUM. J. RACE & L. 168, 169 (2012) (explaining how and why S.B. 1070, legalized racial profiling” and “effectively converts local law enforcement officials into *de facto* U.S. Immigration and Customs Enforcement (ICE) officials”).

<sup>92</sup> *See* Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703 (2013) (discussing the response to anti-immigration sub-federal laws, “‘new immigration federalism’ encompasses dynamic and interactive multi-governmental rulemaking pertaining to immigrants and immigration, including rulemaking intended to foster immigrant inclusion”); *see also* Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 CHI.-KENT L. REV. 13, 14 (2016) (examining cooperation with executive action and nonbinding federal policy as well as non-cooperation, and providing suggestions for DHS efforts to foster state-federal cooperation in enforcement); *see also* Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 SANTA CLARA L. REV. 539, 544 (2017) (providing a complex critique of sanctuary defunding); César Cuauhtémoc García Hernández, *Florida Steps into Anti-Migrant Fray*, CRIMMIGRATION (Jan. 26, 2018), <http://crimmigration.com/2017/11/10/florida-steps-into-anti-migrant-fray/>; Laura Jarrett & Tal Kopan, *Federal judge again blocks Trump from punishing sanctuary cities*, CNN (Sept. 15, 2017), <https://www.cnn.com/2017/09/15/politics/chicago-lawsuit-trump-sanctuary-cities-jag-funds/index.html>.

<sup>93</sup> Mary Fan, *Post-Racial Proxy Battles Over Immigration*, in STRANGE NEIGHBORS: THE ROLE OF STATES IN IMMIGRATION POLICY (Carissa Byrne Hessick & Gabriel J. Chin eds., 2014).

<sup>94</sup> SECURE COMMUNITIES, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT (Jan. 3, 2018), <https://www.ice.gov/secure-communities>.

between federal Immigration and Customs Enforcement officers and state and local criminal law enforcement,<sup>95</sup> including transmission of FBI data to the Department of Homeland Security following a criminal arrest and/or booking into a local jail.<sup>96</sup> It has resulted in significant increases—described by proponents as a “force multiplier”—in apprehensions, detentions and deportations of noncitizens.<sup>97</sup>

The Obama Administration ended Secure Communities, replacing it with the Priority Enforcement Program in response to concerns about the program casting too wide of a net and focusing limited deportation dollars on people arrested for traffic or minor offenses, decreasing community trust in police (that some argue never existed in the first place)<sup>98</sup> and incentivizing racial profiling resulting in disproportionate Latina/o deportations.<sup>99</sup> There was little or no indication that the Priority Enforcement Program decreased racially disparate crimmigration policing.<sup>100</sup> The Trump Administration promptly resurrected Secure Communities.

Crime control arrests by state and local police are imbued with significant discretion, which can be influenced by implicit or express racial bias, and Secure Communities and the Priority Enforcement Program incentivize and mask the role

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<sup>95</sup> *Id.* The Obama Administration ended Secure Communities and replaced it with the Priority Enforcement Program; *see generally*, Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Thomas S. Winkowski et al., Secure Communities (Nov. 20, 2014) (hereinafter Johnson Memorandum on Secure Communities), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf).

<sup>96</sup> SECURE COMMUNITIES, *supra* note 94.

<sup>97</sup> *See* Margaret D. Stock, *Arizona’s Attempt to Enforce Federal Immigration Law: “Force Multiplier,” or “Ball and Chain”?*, 11 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 94 (2010) (citing Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority Of Local Police To Make Immigration Arrests*, 69 ALBANY L. REV. 179 (2006) (referencing Kris Kobach’s notion that state and local regulation of immigration and cooperation with federal enforcement efforts could be a “force multiplier” for the federal government); *see also* Margaret Hu, *Algorithmic Jim Crow*, 86 FORDHAM L. REV. 633 (2017) (critiquing Secure Communities as an “immigration- and security-related vetting protocol” that risks “promulgating an algorithmically driven form of Jim Crow”).

<sup>98</sup> Cházaro, *supra* note 62.

<sup>99</sup> *See, e.g.*, Eisha Jain, *Arrests As Regulation*, 67 STAN. L. REV. 809 (2015) (mapping “regulatory interactions based on arrests and illustrates the need for greater oversight over how arrests are used and disseminated outside the criminal justice system”); *see* Michael Coon, *Local Immigration Enforcement and Arrests of the Hispanic Population*, J. ON MIGRATION AND HUM. SECURITY, 645 (2017) (exploring the effects of implementation of the 287(g) program in Frederick County, Maryland on the arrests of Hispanics. Using data from individual arrest records from the Frederick County Sheriff’s Office, which has a 287(g) agreement with ICE, and the Frederick Police Department, which does not . . . finding that overall, the arrests of Hispanics fell, suggesting that the Hispanic community avoided interaction with law enforcement when the program began . . . but the program led to a significantly higher number of arrests of Hispanics by the Sheriff’s Office than would have occurred in its absence.”); Ramos, *supra* note 63, at 318 (contending that Secure Communities has legalized racial profiling); Juliet P. Stumpf, *D(e)volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259, 1259 (2015) (detailing the rise of Secure Communities and the devolution of discretion that undermined the program).

<sup>100</sup> *The Natural Persistence of Racial Disparities in Crime-Based Removals*, *supra* note 7.

of racial bias in policing, largely shielding it from judicial or other prohibition and, in effect, sanctioning it.<sup>101</sup> Racial bias in criminal sub-federal law enforcement impacts noncitizens racialized as nonwhite because of arresting officers' discretion to arrest,<sup>102</sup> and sub-federal, racially-biased abuse of discretion can occur in the context of using arrests to "control" people in public, and sometimes private, spaces.<sup>103</sup> These practices were implemented during the war on drugs,<sup>104</sup> and the use of warrantless arrests for minor offenses sanctions such racially-biased practices<sup>105</sup> which fall disproportionately on racialized communities of color.<sup>106</sup> Such policing policies and practices are philosophically and functionally not-so-distant cousins of the Black Codes of the post-slavery Jim Crow system, where informally segregated neighborhoods and communities are more heavily policed for status offenses and other regulatory crimes.<sup>107</sup>

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<sup>101</sup> Cházaro, *supra* note 62; *How Racial Profiling in America Became the Law of the Land*, *supra* note 78; *Perpetuating the Marginalization of Latinos*, *supra* note 64.

<sup>102</sup> See Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1853 (2011) (explaining that the "discretion that matters" for noncitizens fearing deportation is the discretion by local law enforcement to arrest and that once noncitizens are put into removal proceedings, there is a "very high [likelihood] that they will be ordered and actually removed").

<sup>103</sup> Sklansky, *supra* note 79, at 157–223 (explaining federal immigration enforcement's merging with sub-federal criminal enforcement induces police to view the two—criminal and immigration law—as different tools to access in achieving their ultimate goal; use whichever best suits the circumstances).

<sup>104</sup> See ALEXANDER, *supra* note 37; Benjamin Levin, *Guns and Drugs*, 84 FORDHAM L. REV. 2173 (2016) (considering drug war policing tactics continuation and adaptation making "race- and class-based critiques;" and addressing "concerns about police and prosecutorial power" and expressing "worries about the social and economic costs of mass incarceration"); see also Doris Marie Provine, *Race and Inequality in the War on Drugs*, 7 ANN. REV. L. & SOC. SCI. 41, 41 (2011) (considering policing tactics sustained by "societal racism and the manipulation of racial stereotypes").

<sup>105</sup> See *Terry v. Ohio*, 392 U.S. 1, 9–17 (1968).

<sup>106</sup> See *Atwater v. Lago Vista*, 532 U.S. 318 (2000); see also *Utah v. Strieff*, 136 S. Ct. 2056, 2070–71 (2016) (Sotomayor, J., dissenting) (citing scholars Michelle Alexander, Ta-Nehisi Coates, Lani Guinier and Gerald Torres, suggesting "[i]t is no secret that people of color are disproportionate victims of this type of scrutiny," referring to racially-biased policing, and "you are not a citizen of a democracy but the subject of a carceral state, just waiting to be catalogued").

<sup>107</sup> See, e.g., Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 656 (2002) (discussing problems with racial profiling by the Maryland State Police); David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265, 267 (1999) (analyzing data supporting the claims of racial profiling of African Americans); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 342 (1998) (arguing that the current Fourth Amendment framework under *Whren* "does not stop arbitrary seizures because it fails to consider that police discretion, police perjury, and the mutual distrust between blacks and the police are issues intertwined with the enforcement of traffic stops"); Kathryn Russell-Brown, *Critical Black Protectionism, Black Lives Matter, and Social Media: Building A Bridge to Social Justice*, 60 HOW. L.J. 367, 371 (2017) (explaining and critiquing the practice of Black protectionism in response to black codes and racial profiling); L. Darnell Weeden, *Johnnie Cochran Challenged America's New Age Officially Unintentional Black Code; A*

During the relatively short period in which the Obama Administration made gestures of inclusiveness<sup>108</sup> and overtures towards criminal justice reform,<sup>109</sup> its way of focusing on immigration enforcement betrayed these purported values. Stating an intention to focus enforcement priorities on noncitizens who had contact with the criminal justice system, purportedly to target the most dangerous immigrants, including “felons, not families” and “criminals, not children,” reinforced narratives of false binaries<sup>110</sup> (good versus bad immigrant) furthering the racialized narrative portraying native-born Central Americans and Mexicans as criminals. President Obama had proclaimed that the priority for enforcement should be “gang members, not a mother who’s working hard to provide for her kids” again, furthering this inaccurate oversimplification, erasing the role of race in the criminal justice and immigration systems.<sup>111</sup> President Obama was responsible for policies that had a

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*Constitutionally Permissible Racial Profiling Policy*, 33 T. MARSHALL L. REV. 135, 140 (2007) (examining how colonial America legalized the practice of racial profiling against those of African heritage and how racial profiling persists as an unintentional new age black code, and the significance of the *Terry v. Ohio* decision); see also Abdallah Fayyad, *The Criminalization of Gentrifying Neighborhoods*, THE ATLANTIC (Dec. 20, 2017), <https://www.theatlantic.com/politics/archive/2017/12/the-criminalization-of-gentrifying-neighborhoods/548837/>.

<sup>108</sup> See Memorandum from Janet Napolitano, Sec’y of Homeland Sec. to David V. Aguilar, Acting Comm’r, U.S. Customs and Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship and Immigr. Servs. & John Morton, Dir., U.S. Immigr. and Customs Enf’t (June 15, 2012) (on file with author) (noting relief is the temporary status accorded to qualifying young people who meet certain conditions and who arrived before they were 16); see also U.S. CITIZENSHIP AND IMMIGR. SERVS., DEFERRED ACTION FOR PARENTS OF U.S. CITIZENS AND LAWFUL PERMANENT RESIDENTS, <https://www.uscis.gov/archive/2014-executive-actions-immigration> (last visited April 8, 2018); U.S. CITIZENSHIP AND IMMIGR. SERVS., YOU MAY BE ABLE TO REQUEST DAPA. WANT TO LEARN MORE?, (Jan. 30, 2015) [https://www.uscis.gov/sites/default/files/USCIS/ExecutiveActions/EAFlier\\_DAPA.pdf](https://www.uscis.gov/sites/default/files/USCIS/ExecutiveActions/EAFlier_DAPA.pdf); President Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), <https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.

<sup>109</sup> Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 815 (2017) (discussing the President’s role in criminal justice reform); see also, *Crimmigration: The Missing Piece of Criminal Justice Reform*, *supra* note 56, at 1094 (discussing crimmigration from a critical race perspective in the context of “Smart on Crime” and President Obama’s request for criminal justice reform).

<sup>110</sup> Cházaro, *supra* note 62, at 600 (describing Obama immigration policy as in part being comprised of “false binaries”).

<sup>111</sup> President Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), <https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>; see also Christie Thompson and Ana Flagg, *Who is ICE Deporting?: Obama’s Promise to Focus Deportation on ‘Felons not Families’ Has Fallen Short*, BUSINESS INSIDER (Sept. 26, 2016), <http://www.businessinsider.com/obama-immigration-policy-deportation-2016-9>; see also Julianne Hing, *Who Are Those “Gangbangers” Obama’s So Proud of Deporting?*, COLORLINES (Oct. 17, 2012), <https://www.colorlines.com/articles/who-are-those-gangbangers-obamas-so-proud-deporting>; see also Elliott Young, *The Hard Truths About Obama’s Deportation Priorities*, HUFFPOST



disparate impact on immigrants from Central America and Mexico before President Trump used every lawful, and at times unlawful, institutional tool to incarcerate and exclude.<sup>112</sup>

President Obama's legacy as the first African-American president may have been limited by historic and institutional factors that are relevant in understanding crimmigration's role in inhibiting socio-economic integration.<sup>113</sup> Even when maximally functional, a democracy, with three branches of government designed to serve as checks and balances, does not act as a check on inequality.<sup>114</sup> Even during the Obama Administration, data indicated that the majority of those deported after coming to the attention of immigration authorities via the criminal justice system had only been arrested for or convicted of minor criminal law or traffic violations. They were also disproportionately Latina/os, with little to no evidence of violent gang-related criminal histories.<sup>115</sup>

The Obama Administration inherited an anti-immigrant legal landscape partially due to Congress' harmful changes to immigration law in 1996. Pursuant to

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(Mar. 1, 2017), [https://www.huffingtonpost.com/entry/hard-truths-about-obamas-deportation-priorities\\_us\\_58b3c9e7e4b0658fc20f979e](https://www.huffingtonpost.com/entry/hard-truths-about-obamas-deportation-priorities_us_58b3c9e7e4b0658fc20f979e).

<sup>112</sup> Dara Lind & Dylan Scott, *Flores Agreement: Trump's executive order to end family separation might run afoul of a 1997 court ruling*, VOX (Jun. 20, 2018), <https://www.vox.com/2018/6/20/17484546/executive-order-family-separation-flores-settlement-agreement-immigration>.

<sup>113</sup> See Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1623 (2009) (considering criticism by civil rights leaders of Obama's post-racial philosophy; he secured his role in part, and may not have otherwise, at the expense of delegitimizing the role of institutional racism); Janine Young Kim, *Postracialism: Race After Exclusion*, 17 LEWIS & CLARK L. REV. 1063, 1065 (2013) (in spite of the Obama presidency, "the idea of a postracial America was never a truth but a debate"); Angela Onwuachi-Willig & Mario L. Barnes, *The Obama Effect: Understanding Emerging Meanings of "Obama" in Anti-Discrimination Law*, 87 IND. L.J. 325, 327 (2012) (examining workplace discrimination in the Obama era, suggesting that president Obama's role in society "developed a specialized meaning that ironically has resulted in an increase in or . . . continuation of regular discrimination and harassment within the workplace" such that the U.S. is not "post-race," and demonstrating the limited symbolic role of an African-American president in the context of systemic racism); Ta-Nehisi Coates, *My President Was Black*, THE ATLANTIC (Jan./Feb. 2017), <https://www.theatlantic.com/magazine/archive/2017/01/my-president-was-black/508793/> (noting the successes of the Obama Administration, as well as the deeply entrenched reasons for the limitations).

<sup>114</sup> As will be discussed below, settler colonial theory suggests that the North American democracy was not designed to serve as a check on settler colonialism and its manifestations.

<sup>115</sup> See, e.g., Alejandra Marchevsky & Beth Baker, *Why Has President Obama Deported More Immigrants Than Any President in US History*, THE NATION (Mar. 31, 2014), <https://www.thenation.com/article/why-has-president-obama-deported-more-immigrants-any-president-us-history/> ("[i]n 2011, Latinos comprised 93 percent of all the people arrested through Secure Communities, even though they represented only 77 percent of the undocumented population" and, less than 77 percent of the overall noncitizen population); Julia Preston, *Latinos Said to Bear Weight of a Deportation Program*, N.Y. TIMES (Oct. 18, 2011), <http://www.nytimes.com/2011/10/19/us/latinos-said-to-bear-weight-of-deportation-program.html>; Thompson & Cohen, *supra* note 71 (quoting President Obama).

the 1996 legislation and subsequent policy, the federal government has increasingly criminalized the act of migration itself. This trend highlights the way in which the notions of criminality and the criminal immigrant have been expanded. A “criminal alien” is statistically likely to be someone who is guilty of an immigration crime like illegal reentry, a status offense like driving without a license, or another minor traffic violation.<sup>116</sup> The full panoply of consequences stemming from interaction with the criminal justice system, including marginalization and the reinforcement of socioeconomic inequities, result, along with the added penalties of potential deportation and separation from family. The perception of lawlessness that results from overstaying a visa, entering without a valid visa, or otherwise violating immigration laws is a manufactured result of infrastructural racial and class-based inequities and undermines integration for “criminal aliens” or people who could be perceived as such.<sup>117</sup>

## 2. The Judiciary—Role of Race in Criminal and Immigration Policing

Prior to the implementation of Secure Communities encouraging sub-federal engagement in federal immigration enforcement and theoretically incentivizing racial profiling, the judicial sanctioning of the use of race or ethnicity as a factor in enforcing civil immigration law, combined with the tacit sanctioning or failure to adequately deter criminal racial profiling, created further institutionalized infrastructure to reinforce the racial disparities in immigration enforcement.

The Court’s 1996 decision in *Whren v. United States*<sup>118</sup> held that a motor vehicle stop did not violate the Fourth Amendment’s protection against unreasonable searches and seizures where the police allegedly had probable cause to believe that the suspect had committed a traffic infraction, even if the officers admitted to using the violation as a pretext to make a race-based stop. This judicial decision demonstrated the shortcomings of structural legal mechanisms to prevent racially-biased criminal law enforcement and was widely criticized by advocates and scholars.<sup>119</sup>

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<sup>116</sup> *Secure Communities and ICE Deportation: A Failed Program?*, TRAC IMMIGR. (Apr. 8, 2014), <http://trac.syr.edu/immigration/reports/349/> (“only 12 percent of all deportees [apprehended through the Secure Communities program] had been found to have committed a serious or ‘Level 1’ offense” based on ICE definitions).

<sup>117</sup> Hernández, *supra* note 86, at 284 (explaining that more visa overstayers are Canadian, and European, though those in immigration prisons are Mexican and Central American).

<sup>118</sup> *Whren v. United States*, 517 U.S. 806 (1996).

<sup>119</sup> See Kevin R. Johnson, *The Story of Whren v. United States: The Song Remains the Same*, in RACE LAW STORIES 419 (Rachel F. Moran & Devon Carbado eds., 2008) (analyzing the factual background of the Supreme Court’s decision in, and the impacts of, *Whren v. United States*); see, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, *supra* note 64; see also Gabriel J. Chin & Charles J. Vernon, *Reasonable but Unconstitutional Racial Profiling and the Radical Objectivity of Whren v. United States*, 83 GEO. WASH. L. REV. 882, 887 (2015) (“Scholars have been overwhelmingly critical of *Whren*.”) (footnote omitted); Lewis R. Katz,

Two decades prior to *Whren*, in two immigration cases, *United States v. Brignoni-Ponce* and *United States v. Martinez-Fuerte*, the Court sanctioned racial profiling in immigration enforcement in ways that would impact immigration and criminal policing.<sup>120</sup> In *Brignoni-Ponce*, the Court authorized immigration border enforcement agents to use race or “Mexican appearance,” amongst other factors, in determining whether an individual had violated immigration laws.<sup>121</sup> The Court in *Martinez-Fuerte* found that referrals to secondary inspection at immigration checkpoints did not violate the U.S. Constitution where made “largely on the basis of apparent Mexican ancestry” because the intrusion, presumably the prolonged stop and investigation, was “minimally intrusive,” in spite of the intrusiveness of the racialized harm justifying such a stop.<sup>122</sup>

The combined effects of judicial decisions—*Whren*’s permitting the use of racial profiling in the war on drugs and *Brignoni-Ponce* and *Martinez-Fuerte*’s sanctioning of use of Mexican or ethnic appearance in immigration enforcement—with crimmigration (federal immigration law and sub-federal counterparts), and Secure Communities created the perfect storm for a facially color-blind, race-neutral crimmigration system resulting in radically racially disproportionate incarceration and deportations.

### 3. Expansion of Crimmigration—Criminalization of Migration

The non-criminal immigration prisoner confined for attempting to seek protection, the DACA-eligible immigrant, and the formally classified “criminal alien” are all characterized as criminal, in need of confinement and control. In addition to the impact criminalization and incarceration have on communities of color and immigrants, the prison-industrial complex has been used to commodify and monetize the lives and bodies of immigrants, just as it has former African-American slaves.<sup>123</sup>

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“Lonesome Road”: *Driving Without the Fourth Amendment*, 36 SEATTLE U. L. REV. 1413, 1414 (2013) (criticizing the marginalization of “the Fourth Amendment’s core value of preventing arbitrary police behavior”); see generally Devon W. Carbado, *[E]Racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002) (exploring in detail the racial dimensions of the modern Supreme Court’s body of Fourth Amendment jurisprudence).

<sup>120</sup> See, *How Racial Profiling in America Became the Law of the Land*, supra note 78, at 1007 (2010) (contending that *Brignoni-Ponce* and *Whren* are “cut from the same cloth” and reinforce racial profiling across criminal and immigration law enforcement lines); see also, *Undocumented Criminal Procedure*, supra note 78.

<sup>121</sup> *Brignoni-Ponce*, 422 U.S. at 886–87.

<sup>122</sup> *United States v. Martinez-Fuerte*, 428 U.S. 543, 551 (1976).

<sup>123</sup> See Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, 150 (2013) (expressly making the connection between fugitive slave rendition and criminal rendition to examine absence of procedural protections to immigrants in rendition proceedings and considering immigration rendition “as a legal system akin to slave and criminal rendition, established to counter the free migration of

As further indication of the drive to contain and confine racialized noncitizens, even Central American migrants and refugees and, previously, Muslim or Arab immigrants with no criminal histories have been criminalized through their incarceration after coming to the United States.<sup>124</sup> This criminalization has attached metaphorically, to Central American migrants fleeing violence in their home countries, and previously, to those perceived as Muslim or of Arab descent after the events of September 11, 2001, in spite of a lack of evidence indicating terrorist ties or criminality.<sup>125</sup> Noncitizens from Central America and Mexico (without criminal histories) are also disproportionately represented in the immigration prison system.<sup>126</sup> Their confinement in private prisons increases the value of private prison

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laborers of color by delivering them back across borders”); Mariela Olivares, *Intersectionality at the Intersection of Profiteering & Immigration Detention*, 94 NEB. L. REV. 963, 964 (2016).

<sup>124</sup> See, e.g., David Cole, *In Aid of Removal: Due Process Limits of Immigration Detention*, 51 EMORY L.J. 1003 (2002) (discussing the detention of foreign nationals after the events of 9/11, absent criminal charges, and without meeting requirements for immigration detention); see also Kristina M. Campbell, *A Dry Hate: White Supremacy and Anti-Immigrant Rhetoric in the Humanitarian Crisis on the U.S.-Mexico Border*, 117 W. VA. L. REV. 1081, 1083 (2015) (examining the growth of the White supremacist movement and examining the role racist groups have played in the detention of Mexican-American and Central American refugees).

<sup>125</sup> See, e.g., Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 U.C. DAVIS L. REV. 609, 611 (2005) (challenging the argument that “the government’s post-9/11 policies have targeted noncitizen Arabs and Muslims, not *citizen* Arabs and Muslims, and racial profiling against aliens does not offend the Constitution” and examining the use of detention targeting Muslim, Arab and South Asian peoples); Ingrid Eagly et. al., *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CAL. L. REV. 785, n.238 (2018) (providing that only one quarter of one percent of family detainees in removal in our study (over 15 years) were charged criminally with removal); Olivares, *supra* note 123 (describing the commodification and mass detention of Central American women and children fleeing harm in their home countries); Scott Rempell, *Credible Fears, Unaccompanied Minors, and the Causes of the Southwestern Border Surge*, 18 CHAP. L. REV. 337 (2015) (considering the Obama Administration’s mass incarceration of Central American women and children coming to the United States); Carrie Rosenbaum, *Due Process is Not Different: Ending Plenary Power Protection of Implicit Racial Bias in Immigration Law* (forthcoming 2018); Taylor & Johnson, *supra* note 72, at 192–207 (comparing President Obama’s mass detention and rapid immigration processing of Central American women traveling with children to the treatment of Chinese migrants in the 1800s).

<sup>126</sup> See Hernández, *supra* note 86, at 283 (citing DEP’T OF HOMELAND SEC. OFF. OF IMMIGR. STAT. ANN. REP., Table 5 (2014) (observing that Mexicans and Central Americans took up over seventy-five percent of the ICE detention population between 2011 and 2013) (stating, “*Though it does not have to be so*, immigration prisons are filled with Mexicans and Central Americans”) (emphasis added) (noting that over ninety percent of civil immigration detainees in fiscal years 2012 and 2013 came from “countries whose citizens are almost exclusively racialized as nonwhite in the United States.” This author added emphasis to underscore the significance of César Cuauhtémoc García Hernández’s express decision to remind his readers that it need not be the case, there is no logical or justifiable reason, that the majority of those in immigration jails are those who are racialized as nonwhite and disproportionately from Central America and Mexico).

stocks for shareholders invested in the private prison business.<sup>127</sup> Imprisonment signifies the imprisoned, either “criminal” immigrant, non-criminal immigrant, or “criminal” citizen as inherently unassimilable and worthy of literal exclusion from the country or metaphoric and practical exclusion from integration into society.<sup>128</sup> As expressed by César Cuauhtémoc García Hernández, “[t]he slave, the death row inmate, the incarcerated criminal, the immigration prisoner: all people denied essential ingredients of citizenship, all framed as dangerous to the political community, all exploited for labor, all marked by race.”<sup>129</sup>

Incarceration is but one signifier of the perceived unworthiness and denial of figurative (and for noncitizens, literal) citizenship or membership resulting in access to socio-economic opportunity. The inability to access socio-economic and political power, and the resulting criminal labeling and confinement or containment, are part of the predetermination, not only by criminalization, but as preconditions to criminalization.<sup>130</sup> “[I]mmigration prisons immobilize migrants’ bodies” and their

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<sup>127</sup> See, e.g., André Douglas Pond Cummings & Adam Lamparello, *Private Prisons and the New Marketplace for Crime*, 6 WAKE FOREST J.L. & POL’Y 407, 421–22 (2016) (“Perhaps the most important reason that supports the elimination of private prisons is their propensity to create a marketplace for crime . . . any changes with respect to drugs and controlled substances or illegal immigration could affect the number of persons arrested, convicted, and sentenced” with a direct impact on private prison profitability); see also DHS Appropriations Act of 2015, Pub. L. No. 114-4, 129 Stat. 39 (Mar. 4, 2015); Kari Hong, *The Costs of Trumped-Up Immigration Enforcement Measures*, 2017 CARDOZO L. REV. DE NOVO 119, 133 (2017) (examining moral, political, social and economic costs of the Trump immigration enforcement measures, including private prisons); Fatma E. Marouf, *Alternatives to Immigration Detention*, 38 CARDOZO L. REV. 2141, 2149 (2017) (examining alternatives to immigration detention and noting that “private prison companies that operate seventy-three percent of the immigration detention beds in the country”); Anita Sinha, *Arbitrary Detention? The Immigration Detention Bed Quota*, 12 DUKE J. CONST. L. & PUB. POL’Y 77, 77 (2017) (examining “the bed quota through the lens of foundational as well as present-day jurisprudence on immigration detention and the Due Process Clause of the Fifth Amendment of the U.S. Constitution” and international human rights law”); Philip L. Torrey, *Rethinking Immigration’s Mandatory Detention Regime: Politics, Profit, and the Meaning of “Custody”*, 48 U. MICH. J.L. REFORM 879, 881–95 (2015) (addressing the detention bed mandate, and proposing alternatives to immigration detention, “often harsher than criminal detention”); Mirren Gidda, *Private Prison Company Geo Group Gave Generously to Trump and Now has Lucrative Contract*, NEWSWEEK (May 11, 2017), <http://www.newsweek.com/geo-group-private-prisons-immigration-detention-trump-596505>; Jeff Sommer, *Trump Immigration Crackdown is Great for Private Prison Stocks*, N.Y. TIMES (Mar. 10, 2017), [https://www.nytimes.com/2017/03/10/your-money/immigrants-prison-stocks.html?\\_r=0](https://www.nytimes.com/2017/03/10/your-money/immigrants-prison-stocks.html?_r=0); see DEP’T OF HOMELAND SEC., DHS RELEASES FISCAL YEAR 2016 ENTRY/EXIT OVERSTAY REPORT, (“of the more than 21.6 million Visa Waiver Program (VWP) visitors expected to depart the United States in FY16, 147,282 overstayed the terms of their admission, with 128,806 suspected in-country overstays”).

<sup>128</sup> Hernández, *supra* note 86, at 288–89; see also, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, *supra* note 1, at 640.

<sup>129</sup> Hernández, *supra* note 86, at 291.

<sup>130</sup> See Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. J. RACIAL & ETHNIC JUST. 163, 163 (2010) (“theoriz[ing] that state and local anti-immigrant laws lead to the segregation, exclusion, and degradation of Latinos from American society

“freedom to ‘escape’ their particular predicaments”<sup>131</sup>—their permanent underclass/caste status, and prisons and criminalization racializes or reinforces, stigmatized racialization coded as the inability to assimilate.<sup>132</sup> The criminal-immigration system contributes to inequality across immigration status and citizenship lines through its reproduction of the paradigm of criminality, arising out of settler colonialism and racialization.<sup>133</sup>

There is connective tissue between the characterization of immigrants as deviant, undesirable, unassimilable, in prior decades, “obnoxious,”<sup>134</sup> and racialized through criminalization.<sup>135</sup> Once European immigrants were racialized as “White,” Mexicans were racialized and demonized as the new “menace.”<sup>136</sup> The initiation of federal prohibition of marijuana falsely portrayed Mexican immigrants as criminally

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in the same way that Jim Crow laws excluded African Americans from membership in social, political, and economic institutions within the United States and relegated them to second-class citizenship”).

<sup>131</sup> Hernández, *supra* note 86, at 290 (citing NICHOLAS DE GENOVA, *THE DEPORTATION REGIME: SOVEREIGNTY, SPACE, AND THE FREEDOM OF MOVEMENT* 58 (2010)).

<sup>132</sup> See Chinn, *supra* note 21, at 682 (assessing cultural claims and claims about relative inclusion/exclusion by comparing legislative history concerning the Chinese Exclusion Act of 1880 as compared to the Trump campaign rhetoric and suggesting that in spite of an overlap between cultural assimilationist claims and racism, they are distinct and the cultural claims regarding inclusion/exclusion may be more easy to overcome than categorically racist arguments against inclusion) (however, regardless of whether Indigenous people, Afrodescendent persons, or immigrants of color are characterized as “unassimilable” or undesirable for explicitly racialized reasons, the outcome is the same, and the problem inherently systemic).

<sup>133</sup> See *infra* Section IV.

<sup>134</sup> *Fong Yue Ting v. United States*, 149 U.S. 698, 743 (1893) (Brewer, J., dissenting) (referring to “the obnoxious Chinese”); *Chae Chan Ping v. United States*, 130 U.S. 581, 603, 607 (1889) (referring to Chinese immigrants when describing “the presence of foreigners of a different race . . . who will not assimilate with us, [and considered] dangerous to [the nation’s] peace and security”).

<sup>135</sup> See, e.g., Keramet Reiter & Susan Bibler Coutin, *Crossing Borders and Criminalizing Identity: The Disintegrated Subjects of Administrative Sanctions*, 51 *LAW & SOC’Y REV.* 567 (2017) (“the U.S. legal system re-labels immigrants (as deportable noncitizen,) and supermax prisoners (as dangerous gang offenders) and this re-labeling begins a process of othering, which ends in categorical exclusions for both immigrants and supermax prisoners”).

<sup>136</sup> See MEA CULPA, *supra* note 72; *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, *supra* note 1, at 639 (discussing how “restructuring social categories, diminishing economic and political power” has perpetuated the marginalization of the Latino population); *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, *supra* note 64, at 645; See generally LEO R. CHAVEZ, *THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION* 41–43 (2d ed. 2013) (discussing the exaggerated and alarmist rhetoric about immigrants and immigration); KARTHICK RAMAKRISHNAN ET AL., *ILLEGALITY, NATIONAL ORIGIN CUES, AND PUBLIC OPINION ON IMMIGRATION* (2010), [https://polisci.osu.edu/sites/polisci.osu.edu/files/NebloNatOrgCues063014\\_0.pdf](https://polisci.osu.edu/sites/polisci.osu.edu/files/NebloNatOrgCues063014_0.pdf) (considering the increase in racial prejudice toward Mexican immigrants in the past decade).

inclined and responsible for selling the drug characterized as insidious.<sup>137</sup> The negative, racialized stereotypes of people of Mexican origin were similar to the racialization of persons of Southeast Asian descent portrayed as opiate addicts.<sup>138</sup>

Carefully crafted misrepresentations about the relationship between race and drugs furthered, and still furthers, rationalization of crime control, as well as immigration policies with punitive and racialized outcomes.<sup>139</sup> The prevailing narrative dictates that, whether Afrodescendant or Latina/o, and whether a United States citizen by birth or immigration, a “criminal” or an “immigrant,” is a person of color.<sup>140</sup>

While exploring the racialization of immigrants of color, it is important to avoid reinforcing the representation of immigrants as good and innocent if they have not had contact with the criminal justice system. Doing so creates a potential attempted claim to whiteness by immigrants at the expense of undermining the struggles of African-Americans or black peoples, including those who, though they may not have

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<sup>137</sup> Carrie Rosenbaum, *What (and Whom) State Marijuana Reformers Forgot: Crimmigration Law and Noncitizens*, 9 DEPAUL J. FOR SOC. JUST. 1 (2016).

<sup>138</sup> MEA CULPA, *supra* note 72 (considers racialization in the context of examining policies considered regrettable, such as Jim Crow laws, slavery, and modern criminal and immigration enforcement and mass incarceration); Steven W. Bender, *The Colors of Cannabis: Race and Marijuana*, 50 U.C. DAVIS L. REV. 689 (2016).

<sup>139</sup> See, e.g., Kelly Welch et al., *The Typification of Hispanics as Criminals and Support for Punitive Crime Control Policies*, 40 SOC. SCI. RES. 822 (2011) (discussing how the association of Blacks and Hispanics with crime correlates with belief in punitive criminal justice policies); RACE AND PUNISHMENT: RACIAL PERCEPTIONS OF CRIME AND SUPPORT FOR PUNITIVE POLICIES, THE SENTENCING PROJECT (2014), [http://sentencingproject.org/doc/publications/rd\\_Race\\_and\\_Punishment.pdf](http://sentencingproject.org/doc/publications/rd_Race_and_Punishment.pdf).

<sup>140</sup> See, e.g., Tanya Golash-Boza & Pierrette Hondagneu-Sotelo, *Latino Immigrant Men and the Deportation Crisis: A Gendered Racial Removal Program*, 11 LATINO STUD. 271 (2013) (examining the disproportionate deportation of Latino men); Doris Marie Provine & Roxanne Lynn Doty, *The Criminalization of Immigrants as a Racial Project*, 27 J. CONTEMP. CRIM. JUST. 261, 261 (2011) (contending that contemporary U.S. immigration policies “reinforce racialized anxieties”); see also Robert S. Chang & Keith Aoki, *Centering the Immigrant in the Inter/National Imagination*, 85 CALIF. L. REV. 1395, 1400–01 (1997) (considering “how the ‘problem’ of legal and illegal immigration is colored in the national imagination: fear over immigration is not articulated solely around foreignness per se; it includes a strong racial dimension”); Sharpless, *supra* note 51 (citing JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM* (2d ed. 1988)) (providing a historical account of the relationship between nativism and racism); Leti Volpp, *Talking “Culture”: Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573, 1616–17 (1996) (“[R]efusing an explicit consideration of ‘race’ or ‘culture’ within our legal system will not result in ‘colorblind’ and ‘cultureblind’ meritocratic justice, but in a replication of dominant patterns of dispersal of power.”); see also MEA CULPA, *supra* note 72 (discussing historical periods where economic anxiety resulted in both racism and anti immigrant sentiment later considered regrettable); George E. Higgins, Shaun L. Gabbidon & Favian Martin, *The Role of Race/Ethnicity and Race Relations on Public Opinion Related to the Immigration and Crime Link*, 38 J. CRIM. JUST. 51, 52–55 (2010) (study finding that “Blacks and Hispanics, in support of . . . minority group threat theory, were less likely than Whites to believe that immigration made crime worse.”); Kelly Welch et al., *supra* note 139 (explaining that representation or perception of Hispanics/Latinos as criminals increase support for punitive crime control).

direct biological ties to slavery, still experience anti-black racism. The legacy of slavery and institutionalized racism is minimized or erased by an immigrant claim to whiteness reliant on the immigrant's lack of contact with the criminal justice system.<sup>141</sup>

This framing of the “good” noncriminal immigrant also undermines advocacy for immigrants racialized as nonwhite. The stigma of criminality has at various times, including presently, attached to those who have entered the U.S. without permission. A claim to whiteness arises from this rhetorical practice and gives credence to a system that is designed to criminalize all racialized people of color, immigrants, or African-American citizens. When the U.S. is characterized as a nation of immigrants to suggest the value of immigrants, the racialization and criminalization of black peoples, and their history as slaves, is erased, and the ability to productively challenge the structures responsible for oppression of all racialized peoples of color is diminished.<sup>142</sup>

Complementing crimmigration are the race-neutral policies that also have disparate impacts—the ending of DACA, the absence of an amnesty program, and to the contrary, a telling re-branding of chain-migration to something manifesting implicitly racialized fears akin to the era of Chinese Exclusion.<sup>143</sup> Dreamers,<sup>144</sup> or

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<sup>141</sup> This is also why racial realism and settler colonialism, combined in particular, provide a framework that does not erase or undermine racialization in ways that can undermine fruitful discussion about the systemic nature of the problems faced by all racialized peoples of color.

<sup>142</sup> Sharpless, *supra* note 51, at 738 (when “[i]mmigrants claim that the United States is a nation of immigrants leaves out the experience of people descended from slaves.”); *see also*, *Tales of Color and Colonialism*, *supra* note 12, at 29–30 (citing LORENZO VERACINI, *SETTLER COLONIALISM: A THEORETICAL OVERVIEW* 30, 108 (2010)) (emphasizing that by “portraying the United States as a “nation of immigrants” settler colonialists “can disappear behind the subaltern migrant” while “settler states” are “recoded as postcolonial migrant societies”).

<sup>143</sup> Arissa H. Oh & Ellen Wu, *Why Immigration Advocates Must Take Back the Term “Chain Migration,”* WASH. POST (February 1, 2018), [https://www.washingtonpost.com/news/made-by-history/wp/2018/02/01/why-immigration-advocates-must-take-back-the-term-chain-migration/?utm\\_term=.db34120fbbal](https://www.washingtonpost.com/news/made-by-history/wp/2018/02/01/why-immigration-advocates-must-take-back-the-term-chain-migration/?utm_term=.db34120fbbal) (“This is the true concern of immigration restrictionists. “Chain migration” (in the pejorative sense) is a rallying cry for those who are alarmed at the country’s increasing racial diversity and who feel that it threatens the essential character of America. By closing off family-based migration, the right aims to effectively enact a racial restriction under a seemingly neutral guise—and thus reverse the browning of America to preserve its narrowly conceived, white American culture.”).

<sup>144</sup> *See generally* Bill Ong Hing, *Ethics, Morality, and Disruption of U.S. Immigration Laws*, 63 U. KAN. L. REV. 981, 983 (2015) (considering DREAMers and DACA in the context of “the unnecessary havoc” of particularly immigration enforcement tools, and “the resistance to these policies by immigrants and their supporters who have attempted to disrupt the enforcement tools”); Michael A. Olivas, *The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757 (2009); *see also* Allegra M. McLeod, *Immigration, Criminalization, and Disobedience*, 70 U. MIAMI L. REV. 556, 575 (2016) (exploring “two contending visions of immigration justice” including procedural rights pursuits and a social justice movement challenging restrictionism, and, considering the limitations and challenges of the dichotomous narrative that “generally differentiate[s] “good” from “bad” and “criminal” aliens, primarily along lines of legal status and law-breaking”).



children brought to the United States who live without legal immigration status in the United States, exemplify the paradigm of the good and innocent versus the bad immigrant, such as their parents, who are implied to have had made a more volitional choice in migrating contrary to the law. Portraying some immigrants as more deserving reinforces the narrative of the “criminal” or bad immigrant, whose offense was the act of migrating as an adult, with the presumed ability to make a choice about such migration.<sup>145</sup>

The narratives of crimmigration and chain migration demonstrate a simple truth—there is no good immigrant, because there is always a narrative that deems a racialized immigrant of color as unassimilable, which necessitates or predestines exclusion or deportation. When an asylum seeker is portrayed as requiring incapacitation and incarceration, and family members wishing to pursue a legal path to immigrate via “chain migration” are unwelcome, the racial reality<sup>146</sup> of crimmigration and the larger paradigm come into focus such that there is no “good” immigrant.

Criminal justice reform, before shifting back towards punitiveness,<sup>147</sup> had predictable systemic limitations when contextualized by racial realism and settler colonialism. Despite recognizing of the failure of the war on drugs and taking measures like state-level reforms to decriminalize marijuana, the respectability narrative identifying “good” versus “bad” immigrants has been maintained, and little or no measures have been taken to recognize and address the historic racial inequities plaguing the criminal justice and crimmigration systems.<sup>148</sup>

Those deemed appropriate targets for removal are simultaneously branded as not worthy of integration and prevented from the means by which to demonstrate their worthiness to integrate. Respectability messaging is a tool that serves to further hinder integration and helps illustrate the ways in which the crimmigration system continues to function as a part of a larger infrastructure designed not to invite equal

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<sup>145</sup> Keyes, *supra* note 1 (addressing the need for more exercises of discretion in immigration courts, and moving beyond the “good” v. “bad” immigrant false dichotomy) (noting that the good/bad or moral/immoral dichotomies are overly simplistic and mask the biases in the criminal and immigration enforcement systems that reinforce such polarizing narratives that validate the existing systems of immigration, criminal law, and crimmigration).

<sup>146</sup> See Hsiao-Hung Pai, *Racism is at the heart of Europe’s approach to asylum and immigration*, LSE HUMAN RIGHTS (Feb. 6, 2018), <http://blogs.lse.ac.uk/humanrights/2018/02/06/racism-is-at-the-heart-of-europes-approach-to-asylum-and-immigration/>.

<sup>147</sup> See Ryan J. Reilly, *Jeff Sessions Rolls Back Obama-Era Drug Sentencing Reforms*, HUFFPOST (May 15, 2017), [https://www.huffingtonpost.com/entry/jeff-sessions-doj-drug-sentencing-trump\\_us\\_59155c78e4b0fe039b339a20](https://www.huffingtonpost.com/entry/jeff-sessions-doj-drug-sentencing-trump_us_59155c78e4b0fe039b339a20); see also Rebecca R. Ruiz, *Attorney General Orders Tougher Sentences, Rolling Back Obama Policy*, N.Y. TIMES (May 12, 2017), <https://www.nytimes.com/2017/05/12/us/politics/attorney-general-jeff-sessions-drug-offenses-penalties.html>.

<sup>148</sup> *The Colors of Cannabis*, *supra* note 138; *What (and Whom) State Marijuana Reformers Forgot*, *supra* note 137 (critiquing the failure of state-level criminal justice reforms to marijuana laws for the failure to consider the racially-laden impacts of remaining drug laws on noncitizen Latina/os).

integration and access, but to continue to perpetuate difference.<sup>149</sup>

The function of crimmigration and the failure of immigrant integration make more sense when viewed through the lenses of settler colonialism and Derrick Bell's theory of racial realism. The socio-economic disparities between the settler class, or those racialized as white, and people racialized as nonwhite, including immigrants, are sustained by an infrastructure never designed to create racial equality, but instead intended to create race, racialized difference, and disparity.

#### D. *Settler Colonialism and Racial Realism*

Racial realism, the theoretical principal conceived of by critical race scholar Derrick Bell, proposes that it may be useful to consider equality and integration from the perspective that Black people (and logically also all racialized people of color) will never gain full equality in the United States through the existing legal, political, and economic systems or racial remedies.<sup>150</sup> Relatedly, settler colonialism helps explain why this is true, providing historical, yet continually relevant, context. The combined methodologies provide a framework for broadening the examination of the relationship between crimmigration and immigrant integration, interrogating the institutional mechanisms responsible for persistent inequality across lines of citizenship.

Crimmigration is one facet of the systemic cause of socio-economic segregation between racialized people of color and the settler class. The inability to achieve racial equality or integration emanate from a history that dictates the status quo. Disparities between immigrants and the settler class, and Afrodescendants and peoples of color are similar. As was the case in 1992 when Derrick Bell wrote his famed article "Racial Realism," Blacks or Afrodescendants are still no closer to equality.<sup>151</sup>

"More than one-quarter of all black, Latina/o, and American Indian residents live below the poverty line, compared to about one tenth of white residents."<sup>152</sup> As

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<sup>149</sup> Sharpless, *supra* note 51, at 706.

<sup>150</sup> *Racial Realism*, *supra* note 5, at 374; see Derrick A. Bell, *Serving Two Masters: Integration Ideal and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 486–87 n.50 (1976) (discussing the role of the concept of integration in reinforcing the racialized power dynamics of slavery).

<sup>151</sup> See, *Racial Realism*, *supra* note 5, at 375 (citing Colin McCord, M.D. & Harold P. Freeman, M.D., *Excess Mortality in Harlem*, 322 NEW. ENG. J. MED. 173 (1990)) (explaining that "in central Harlem, where 96 percent of the inhabitants are black and 41 percent live below the poverty line, the age-adjusted rate of mortality was the highest for New York City—more than double that of U.S. whites and 50 percent higher than that of U.S. blacks generally. Black men in Harlem are less likely to reach the age of 65 than men in Bangladesh.") (noting that "of 353 health areas in New York City, 54 also had twice as many deaths among people under the age of 65 as would be expected if the death rates of U.S. whites applied. All but one of these areas of high mortality were predominantly black or Hispanic."); see also, *Id.* at 374; see generally, *Tales of Color and Colonialism*, *supra* note 12.

<sup>152</sup> *Tales of Color and Colonialism*, *supra* note 12, at 13.

of 2010, the median income of black households was less than sixty percent of that of their white counterparts, a percentage that has not changed significantly since 1972.<sup>153</sup> Moreover, a majority of African Americans born to middle-income families in the late 1960s have been “downwardly mobile” since then. “[W]elfare reform and its consequences” “were instituted with little explicit discussion of race because ‘welfare,’ like ‘crime,’ ‘had become a code word for race.’”<sup>154</sup>

Racialized noncitizens of color are similarly situated to their Afrodescendent counterparts. As described above, the criminal justice system, and crimmigration, play a role in creating this landscape. A timely example of the way in which crimmigration serves settler colonial principles is the Trump Administration’s use of incarceration of asylum-seeking families and children as a deterrent to migration. At the time of writing, the Administration had failed to comply with a court order to reunite all separated families.<sup>155</sup> The Administration’s intention to deter migration by inflicting inhumane harm may continue to evade the checks and balances of the legal system, one ill-equipped to prevent future harm or ensure justice and safety for those already impacted.<sup>156</sup>

Settler colonialism provides a historic and contemporary framework within which to more completely and accurately unpack and examine this state of affairs. When coupled with racial realism, the theory demonstrates why integration and assimilation are equally inappropriate terms to describe the problem. This conclusion can help move the conversation past proposed systemic equality-based remedies that have continually failed.

### 1. Settler Colonialism

Distinct from colonialism, where the colonizer eventually departs, marking an end to the process of colonization, under settler colonialism, which is fundamentally structural and outlasted colonialism, colonizers come to stay, or otherwise create systems with lasting impact.<sup>157</sup> They replace original communities in an ongoing

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<sup>153</sup> *Id.* at 55.

<sup>154</sup> *Tales of Color and Colonialism*, *supra* note 12, at 19 (citing Peter Edelman, *Welfare and the Politics of Race: Same Tune, New Lyrics?*, 11 GEO. J. POVERTY L. & POL’Y 389, 397 (2004)).

<sup>155</sup> By separating and detaining families and pressuring them to take orders of removal, the Trump Administration prevents their migration and potential future integration into the U.S., but also all but ensures their elimination. See Philip G. Schrag, *A Fate Worse than Separation Awaits Central American Families*, SEATTLE TIMES (July 16, 2018), <https://www.seattletimes.com/opinion/a-fate-worse-than-separation-awaits-central-american-families/>.

<sup>156</sup> See, *Immigration Exceptionalism*, *supra* note 7, at 639 (doctrinal principles, like federalism, have been argued both in support of, and against “integrationist subfederal” policies”). The extent to which equality principles can prevail in the subfederal v. federal immigration debate are limited by the jurisprudential system.

<sup>157</sup> HIXSON *supra* note 6, at 5.

process with a multitude of implications.<sup>158</sup> The settler colonialism relevant to understanding the systemic causes of the failing of immigrant integration includes the traditionally erased or minimized context for settlers' activities—a continuing “unforming or reforming [or forcibly relocating] the communities” that already existed. Immigration scholars have begun to explore the relevance of the analytical framework of settler colonialism in immigration law, but it has largely been underutilized.<sup>159</sup>

One piece of this puzzle in attempting to better understand socio-economic disparities faced particularly by Latina/o noncitizens, emanates from the forcible acquisition of California, Texas, New Mexico, Arizona, Utah and Colorado, pursuant to the Treaty of Guadalupe Hidalgo in 1848 after the Mexican-American War.<sup>160</sup> Ever since, Latina/o immigrants have been deprived sovereignty and have been imagined as temporary and perceptibly disposable workers, subject to forcible and random “repatriation” and expulsion.<sup>161</sup> Other modern manifestations of settler colonialism relevant to treatment of Latina/o immigrants and citizens are the history of Latino lynching, and the role of the death penalty today as a modern form of state-sanctioned racialized violence.<sup>162</sup>

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<sup>158</sup> *Id.*

<sup>159</sup> See, e.g., Sherally Munshi, *Immigration, Imperialism, and the Legacies of Indian Exclusion*, 28 YALE J.L. & HUMAN. 51, 54 (2016) (exploring the relationship between imperial formations and immigration controls by focusing on the exclusion of Indian immigrants from the white-settler world in the early twentieth century); Dean Spade, *Laws As Tactics*, 21 COLUM. J. GENDER & L. 40, 67 (2012) (exploring how little the most vulnerable trans people have to gain from becoming enfolded into the “equality” and “humanity” frameworks offered by these law reforms, and they expose how these identities are reconstituted to become productive for ongoing projects of nation-making founded in heteropatriarchal slavery and settler colonialism and continued through criminalization, immigration enforcement, displacement and occupation); Leti Volpp, *The Indigenous As Alien*, 5 U.C. IRVINE L. REV. 289, 292–93, n.22 (2015) (exploring “nonrecognition of settler colonialism underpinning immigration law scholarship,” particularly, how . . . “Indians”—was understood within the laws created to govern another [group]—“aliens”) (“I see this Article as also responding to the way in which different communities are defined through parallel and divergent experiences in the United States namely, African-Americans experienced slavery, Mexicans experienced conquest, Native Americans experienced genocide, and Asians experienced immigration exclusion. This story of parallel and divergent experiences assumes that each group was shaped only by one particular relationship to the U.S. nation-state.”).

<sup>160</sup> See, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, *supra* note 1 (describing the historical context for racialization, criminalization, oppression, incarceration and deportation of Latinos) (citing OTIS A. SINGLETARY, *THE MEXICAN WAR* 160–62 (1960)); *Treaty of Guadalupe Hidalgo*, HISTORY, <http://www.history.com/topics/treaty-of-guadalupe-hidalgo>, archived at <http://perma.cc/7YKZ-F873>.

<sup>161</sup> *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, *supra* note 1, at 617–22.

<sup>162</sup> See Maritza Perez, *Los Lazos Viven: California's Death Row and Systematic Latino Lynching*, 37 WHITTIER L. REV. 377, 378–79 (2016)) (“prevalence of, and the motivations behind, Latino lynching in California between 1830–1935–6 (2) highlight some troubling examples of anti-immigrant rhetoric that the media and politicians have perpetuated over the last decade, the spirit of

Settler colonialism is partially defined by the settler class' "civilizing mission" to erase existing identities and define others in the vision and mold of the settler class.<sup>163</sup> Settler colonial theory suggests that we approach the problem of racial disparity from the viewpoint and understanding that settlers did not come to "join someone else's society" but came to "exercise complete control" over existing people and their land, and these "relations were enshrined in the American legal system, which continues to be utilized to ensure that each person remains in his or her 'place,' literally and figuratively."<sup>164</sup>

As Yolanda Vázquez explains in examining the relationship between the "manifest destiny of Europeans" and modern-day crimmigration, "[t]he relationship between the United States and Latin American countries has its historical roots in conceptions of the innate superiority of whites."<sup>165</sup> This perpetuation of the myth of superiority is one piece of the settler colonial process and is enshrined in U.S. immigration and crimmigration law, including the ways in which it perpetuates racialized exclusion and exclusiveness. While settler colonialism at first glance appears to be a thing of the past, its implications are present today in U.S. immigration and crimmigration policy and have a dynamic interconnectedness with respect to crimmigration and integration.

To clarify and distinguish colonialism from settler colonialism, the settler colonist does not colonize and leave, but remains, having a distinct plan for and impact on the ensuing socio-political structure put into place.<sup>166</sup> Indigenous scholar Andrea Smith suggests that racial realism<sup>167</sup> implicates the deeper and more historical systems of power that are described as settler colonialism to help chart a

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which is captured in anti-immigration practices and policies across the country; (3) explain how this political rhetoric breeds racial bias and violence; (4) show how racial bias infiltrates the criminal legal system by examining trends in capital punishment sentencing; and (5) outline how Latinos can coalesce to eliminate the death penalty, as it constitutes state-sanctioned, racialized violence").

<sup>163</sup> *Tales of Color and Colonialism*, *supra* note 12, at 23 (citing ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 4 (2007)); *see also*, *SETTLER COLONIALISM: A THEORETICAL OVERVIEW*, *supra* note 142, at 30 (citing María Josefina Saldaña-Portillo, "How many Mexicans [is] a horse worth?" *The League of United Latin American Citizens, Desegregation Cases, and Chicano Historiography*, 107(4) *SOUTH ATLANTIC Q.* 809, 812 (2008)).

<sup>164</sup> *Tales of Color and Colonialism*, *supra* note 12, at 7 (citing Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 *HARV. L. REV.* 1841 (1994)).

<sup>165</sup> *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, *supra* note 1, at 611 (2015) (citing REGINALD HORSMAN, *RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO SAXONISM* (1981) (discussing that the belief that whites were superior to all other races was deeply held in the United States by 1800).

<sup>166</sup> *See* HIXSON *supra* note 6, at 1–2, 5 (Anglo-American settler colonists constructed Whiteness as a means of protecting their privilege).

<sup>167</sup> *See*, *Racial Realism*, *supra* note 5.

path towards understanding the possibilities of legal reform.<sup>168</sup> What is perceived of, or characterized as a failure of immigrant assimilation or integration, recognizing that the two are different but also very similar,<sup>169</sup> is “deeply entrenched racialized privilege and subordination.”<sup>170</sup> Settler colonialism is at the heart of the deep institutionalization of these manufactured perceptual and real lived differences.

The “civilizing mission” of colonialism,<sup>171</sup> intended to “redeem[] the backward, aberrant, violent, oppressed, undeveloped people of the non-European world by incorporating them into the universal civilization of Europe,”<sup>172</sup> could just as readily describe the way in which voluntary or involuntary Chinese migrants to the U.S. were described at the time of the Chinese Exclusion Act.<sup>173</sup> Similarly, today, racialization of migrant Others survives as a “strategy . . . to subordinate peoples of color” in service of a “multi-layered racial hierarchy.”<sup>174</sup> This strategy has been evident for decades, including with respect to migrants from Central America and Mexico evidenced by the “ethnic transfer” of Mexican nationals, and some U.S. citizens’ forcible “repatriation” to Mexico during the Depression, as well as subsequent racially and ethnically targeted deportations, and criminalization by expanded use of detention.

Lorenzo Verancini could have been referring to racialized immigrants when he suggested that, “[a] triumphant colonial society,” is defined by “forever postpon[ing] ‘the promised equality between colonizer and colonized’ or between settler class

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<sup>168</sup> *Tales of Color and Colonialism*, *supra* note 12, at 5 (citing Andrea Smith, *The Moral Limits of the Law: Settler Colonialism and the Anti-Violence Movement*, 2 SETTLER COLONIAL STUD. 69, 71 (2012)).

<sup>169</sup> Perhaps a distinction with little difference if assimilation connotes erasure of history, language and culture, and integration purportedly suggests maintaining of those things yet achieving the socio-economic status and markers of identity of the settler class, but, that integration is never forthcoming because of the impossibility of such achievement, without actually shedding language, history, culture and race—at least one of which is an immutable characteristic that makes integration permanently unattainable.

<sup>170</sup> *Tales of Color and Colonialism*, *supra* note 12, at 8.

<sup>171</sup> *Tales of Color and Colonialism*, *supra* note 12, at 23 (citing ANGHIE, *supra* note 163).

<sup>172</sup> *Tales of Color and Colonialism*, *supra* note 12, at 23 (citing ANGHIE, *supra* note 163, at 3); see also JÜRGEN OSTERHAMMEL, COLONIALISM: A THEORETICAL OVERVIEW 17 (Shelley Frisch trans., 2005) (“Rejecting cultural compromises with the colonized population, the colonizers are convinced of their own superiority and of their ordained mandate to rule.”).

<sup>173</sup> See, e.g., Renee C. Redman, *From Importation of Slaves to Migration of Laborers: The Struggle to Outlaw American Participation in the Chinese Coolie Trade and the Seeds of United States Immigration Law*, 3 ALB. GOV’T. L. REV. 1, 2–5 (2010); Chae Chan Ping, 130 U.S. 581 (upholding the exclusion of all Chinese workers and denying rights under the Due Process clause of the Fifth Amendment); Fong Yue Ting, 149 U.S. 698 (upholding deportation of three permanent residents who lacked the statutorily required White witnesses to confirm their status).

<sup>174</sup> *Tales of Color and Colonialism*, *supra* note 12, at 60.

and immigrant.<sup>175</sup> Race “emerged as a shifting political and social construct” to establish and entrench power structures, through the European colonialism process, and in the words of Gerald Torres, race is still a “proxy for power,” where settler colonialism is evidenced by the continuing racial disparities and massive accumulation of wealth of the settler class, as compared to Afrodescendants, peoples of color, and similarly racialized immigrants.<sup>176</sup>

Kelly Lytle Hernández’s description of incarceration as “human caging,” a “form of elimination,” and “incident and instrumental to settler colonialism”<sup>177</sup> should cause no cognitive dissonance for immigration scholars addressing immigration detention. In examining Hernández’s book, Jennifer M. Chacón notes that while there are critical legal distinctions between criminal and immigration incarceration that implicate different sets of rights, there is discursive and theoretical power in conceptualizing all incarceration as a form of human caging. The role of crimmigration in creating difference, subjugation, and elimination comes into focus when crimmigration is viewed from the perspective of Hernández’s analysis of all forms of incarceration as a form of elimination emanating from settler colonialism. If Los Angeles is any kind of microcosm for the country, crimmigration, particularly the way in which it presents facially race-neutral tactics<sup>178</sup> to police, is but one tool, or manifestation, of settler colonialism.

By framing racial disparities and oppression within the settler colonial methodology, it is possible to recognize the systems of power responsible for the oppression in general, and specifically within the context of crimmigration, and the impact of crimmigration’s racial biases on the ability of racialized immigrants to either experience equality or the socio-economic status of the settler class. Settler colonialism teaches us that “racial remedies,” even those entrenched in the constitution, will continue to be insufficient in achieving equality and integration. Fundamentally, it may be that only the end of race will provide the most complete answer to this problem.

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<sup>175</sup> *Tales of Color and Colonialism*, *supra* note 12, at 24 (citing SETTLER COLONIALISM: A THEORETICAL OVERVIEW, *supra* note 142).

<sup>176</sup> *Tales of Color and Colonialism*, *supra* note 12, at 20 (citing Gerald Torres, *American Blood: Who Is Counting and for What?*, 58 ST. LOUIS UNIV. L. J. 1017, 1019 (2014)).

<sup>177</sup> Jennifer M. Chacón, *Unsettling History City of Inmates: Conquest, Rebellion, and the Rise of Human Caging in Los Angeles, 1771–1965*, by Kelly Lytle Hernández. Chapel Hill, N.C.: University of North Carolina Press. 2017. Pp. 301. \$28.00, 131 HARV. L. REV. 1078, 1079 (2018) (citing KELLY LYTLE HERNÁNDEZ, UNSETTLING HISTORY CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES (2017)). Hernández’ book examines what she intentionally characterizes as the Spaniard colonists’ practice of “human caging” of members of the Tongva-Gabrielino in the mid-eighteenth century, tracing it through the disproportionate incarceration, and policing of black Angelinos in the first half of the twentieth century.

<sup>178</sup> Chacón references Hernández’s discussion of facially neutral public order laws allowing for the arrest of Native peoples for vagrancy “on the complaint of any [reasonable] citizen” but enforced primarily against native Americans. Chacón, *Unsettling History City of Inmates*, *supra* note 177, at 1087.

## 2. Racial Realism

Racial realism, the theoretical principal conceived of by critical race scholar Derrick Bell, suggests that Black people (and logically also all racialized people of color) will never gain full equality in the United States through the existing legal, political and economic systems and racial remedies.<sup>179</sup> Accordingly, “reliance on racial remedies” is destined to “do little more than bring about the cessation of one form of discriminatory conduct that soon appear[s] in a more subtle though no less discriminatory form.”<sup>180</sup> Bell stated that instead of presuming that Black people will gain full equality in the United States as a result of the existing racial remedies (or presumably ones like them), the “mind-set or philosophy” of racial realism requires “us to acknowledge the permanence of [] subordinate status.”<sup>181</sup> Recognizing the flaws in the system, or more accurately, the intentional crafting of the legal system to *appear* flawed when racial discrimination evades remedy, can create space for more productive discussions, including those about crimmigration and immigrant integration.<sup>182</sup>

The civil rights and other legal gains of the 1960s and 1970s have not resulted in equality, but instead, Black people, and all racialized peoples of color are “more deeply mired in poverty and despair than they were during the ‘Separate but Equal’ era.”<sup>183</sup> Racial Realism suggests a need to dig deeper than jurisprudential or legal remedies like Equal Protection and Due Process, and instead, examine inequality through a lens of racial realism that necessitates deeper structural change.<sup>184</sup> History

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<sup>179</sup> *Racial Realism*, *supra* note 5, at 374; *see, Serving Two Masters*, *supra* note 150, at 486–87 n.50 (discussing the role of the concept of integration in reinforcing the racialized power dynamics of slavery); *Racial Realism*, *supra* note 5, at 373.

<sup>180</sup> *Racial Realism*, *supra* note 5, at 373.

<sup>181</sup> *Id.* at 373–74.

<sup>182</sup> *See* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008) (contrary to Bell’s focus on addressing race directly in the context of systemic change, scholar Martha Albertson Fineman offers an alternative methodology to address inequality that instead of focusing on race, begins the point of inquiry with vulnerability suggesting that a vulnerability approach provides the opportunity to move past identity-based inquiries while still focusing on discrimination and privilege to challenge institutions and societal structures that sustain inequity. Yet the author suggests that if “vulnerability” is post-identity oriented, concerned with institutional privilege, while vulnerability is part of the human condition, such a post-racial approach could backfire in the same kinds of ways ignoring racial inequities has, allowing further re-entrenchment of those same systems. It could be a more politically palatable approach, but may not be any more successful than other race-neutral models).

<sup>183</sup> *Racial Realism*, *supra* note 5, at 374; William R. Tamayo, *When the “Coloreds” Are Neither Black nor Citizens: The United States Civil Rights Movement and Global Migration*, 2 ASIAN L.J. 1, 10–15 (1995) (discussing how the Civil Rights Movement is “ill-equipped to deal with an increasingly multiracial and multicultural America.).

<sup>184</sup> *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (holding that a violation of the Fourth Amendment does not entitle a noncitizen to exclude unlawfully obtained evidence in civil immigration



has demonstrated the limitations of doctrinal or bureaucratic fixes to problems rooted in settler colonialism, including not only the practice of human caging, but of crimmigration.<sup>185</sup> The small strides taken to recognize the disparities faced by immigrants, as noted by scholar Hiroshi Motomura in examining the broader applicability of *Plyler v. Doe*, are pragmatic, small (yet still somewhat radical), and noble steps, but they have similar limitations.<sup>186</sup> Indeed, “racial patterns have adapt[ed] in ways that maintain white dominance” to all communities of color in the United States—immigrant and citizen alike.<sup>187</sup>

Bell explained the systemic nature of the problem and its purported legal solutions—“[t]he message the formalist model conveys is that existing power

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court removal proceedings, even if s/he would be able to access the exclusionary rule in criminal court); *Intentional Blindness*, *supra* note 39 (explaining the systemic shortcomings of equal protection jurisprudence as serving to protect the racial status quo); *see, e.g.*, Stella Burch Elias, “Good Reason to Believe”: Widespread Constitutional Violations in the Course of Immigration Enforcement and the Case for Revisiting *Lopez-Mendoza*, 2008 WIS. L. REV. 1109 (2008) (contending that “remaining faithful to *Lopez-Mendoza* requires the reintroduction of the exclusionary rule in immigration proceedings”); Elizabeth A. Rossi, *Revisiting INS v. Lopez-Mendoza: Why the Fourth Amendment Exclusionary Rule Should Apply in Deportation Proceedings*, 44 COLUM. HUM. RTS. L. REV. 477 (2013); Eda Katharine Tinto, *Policing the Immigrant Identity*, 68 FLA. L. REV. 819 (2016) (arguing that “in the immigration context, current exclusionary rule doctrine often wrongly shields evidence from suppression that the rule normatively intends to suppress and unwittingly undermines the animating function of the exclusionary rule—the deterrence of unconstitutional police misconduct”); Elizabeth L. Young, *Converging Systems: How Changes in Fact and Law Require A Reassessment of Suppression in Immigration Proceedings*, 17 U. PA. J. CONST. L. 1395, 1398–1400 (2015) (arguing that “the nature of immigration proceedings and increased enforcement possibilities—have also increased the deterrent value of the exclusionary rule in more subtle ways” and the development of the exclusionary rule has been moving towards requiring the same level of egregiousness as in criminal law, “the Court should re-examine whether to apply the exclusionary rule in immigration proceedings”); *see also* Jason A. Cade, *Policing the Immigration Police: ICE Prosecutorial Discretion and the Fourth Amendment*, 113 COLUM. L. REV. SIDEBAR 180 (2013) (considering instances where ICE exercises discretion in cases involving systemic unlawful policing); *A Diversion of Attention?*, *supra* note 84 (examining the procedural deficiencies of the immigration removal system including the incomplete applicability of constitutional protections including the suppression remedy); *The Role of Equality Principles in Preemption Analysis of Sub-Federal Immigration Laws*, *supra* note 63, at 483 (considering preemption or constitutionality of immigrant integrative or protective policies in light of shortcomings of existing remedies to profiling in sub-federal, pretextual immigration enforcement).

<sup>185</sup> Chacón, *Unsettling History City of Inmates*, *supra* note 177, at 1082 (discussing anticipated critiques of Hernández conflating all forms of criminal and civil incarceration into “caging,” including the difficulty of proposing doctrinal and bureaucratic fixes; though Chacón emphasizes the discursive and conceptual value of Hernández’ chosen framing, including, but not limited to the way this theoretical approach honors the rebel archive of activists recognized in the book, and the way in which it “offers an important reminder that carceral control is both exercised and experienced in ways that can be obscured by formalistic analysis”).

<sup>186</sup> HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* (2014) (noting that *Plyler* and its ethos, is and was a starting point, but much work is needed to produce a “broader and deeper understanding of unauthorized migration” in the vein of the “noblest aspects of the US Constitution”).

<sup>187</sup> *Tales of Color and Colonialism*, *supra* note 12, at 5 (citing *Racial Realism*, *supra* note 5, at 373).

relations in the real world are by definition legitimate and must go unchallenged” and “[e]quality theory also necessitates such a result.”<sup>188</sup> “Precedent” and “rights theory” are “formal rules” that serve a “covert,” not even overt, purpose, and “will never vindicate the legal rights of black Americans,”<sup>189</sup> and equally, would fail to do so for racialized<sup>190</sup> immigrants. As Ian Haney Lopez expressed, newcomers, as well as racialized noncitizens of color who already reside in the United States, are classified according to an American system of constructed racial identities.<sup>191</sup> Racial Realism, and complementarily, settler colonialism, serve as means to better interrogate and disrupt these assumptions and constructions.

Settler colonialism and racialization merge or come together where settler society reinforces the dynamic of racialized difference to “ensure[] that the assimilationist vision proffered by the settlers will remain just out of reach” helping to explain the “construction and perpetuation of racialized hierarchy in the United States.”<sup>192</sup> It also helps to perceive of settler colonialism as explained by Wolfe as “a structure” and “not an event.”<sup>193</sup> Similarly, “integration” is equally out of reach, as is equality. The systems that comprise settler colonialism are concepts, as well as concrete infrastructures, encompassing judicial processes, political decision-making systems, policing, and systems designed to afford or deny membership, whether legal citizenship, or the idea of who is or can be a citizen or member.

The shift from slavery, to Jim Crow and Black Codes, to the war on drugs, and mass or hyper-criminalization and incarceration, and now hyper-crimmigration, can be better understood through the frame of settler colonialism and racial realism. This transition from slavery to modern-day incarceration and pseudo-slavery signifies a “shift from an initial drive to create an ever-expanding slave labor force to the perception of black people as a ‘surplus’ population to be contained and controlled . . .”<sup>194</sup>

The same is true of immigrants as nonwhite who have filled a role similar to racialized black people as highly regulated, underpaid or unpaid labor, as well as a homogeneous group, distinct from the settler class, and requiring containment and control, rather than equality or a life similar to that lived by the settler class. In a

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<sup>188</sup> *Racial Realism*, *supra* note 5, at 376.

<sup>189</sup> *Id.*

<sup>190</sup> *Tales of Color and Colonialism*, *supra* note 12, at 4 (citing John J. Powell, *Post-Racialism or Targeted Universalism?*, 86 DENV. U.L. REV. 785, 788–91 (2009)) (explaining the use of the term “racialized” or “racialization” to mean the “dynamic ‘set of practices, cultural norms, and institutional arrangements that are both reflective of and simultaneously help to create and maintain racialized outcomes in society.’”).

<sup>191</sup> Ian Haney-López, *The Social Construction of Race*, 29 HARV. C.R.-C.L. L. REV. 1 (1994).

<sup>192</sup> *Tales of Color and Colonialism*, *supra* note 12, at 28 (citing ANGHIE, *supra* note 163, at 4).

<sup>193</sup> See Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. OF GENOCIDE RES. 387, 388 (2006).

<sup>194</sup> *Tales of Color and Colonialism*, *supra* note 12, at 42.

formally colorblind way, these tools of containment and control have been exercised via crimmigration and institutionalized treatment of immigrants of color.

*E. Immigrant Integration, Assimilation, Equality, and the Constructed Restrictions on Membership*

Membership theories, and the concepts of integration, assimilation, and equality principles provide tools to understand relationships between the settler class, and people of color, including immigrants, noncitizens, and citizens. Ultimately, these tools underscore the way in which the criminal justice system, and crimmigration, support institutionalized systems that explain the historical continuity of a lack of equality, incomplete membership, and failed integration or assimilation.<sup>195</sup>

Derrick Bell proposed that the goal should not be “the romantic love of integration,” (full of false promises) nor the “long-sought goal of equality under law” in spite of the need to keep fighting against racism.<sup>196</sup> Similarly, and importantly, instead of discussing crimmigration’s racial implications from the perspective of equality, or integration, it may prove useful to start the conversation there, but then shift the discussion towards resisting oppression, and reframing it around structural change.

1. Integration and Assimilation—Two Sides of the Same Coin

In some contexts, immigrant integration can mean “incorporation of immigrants and their descendants into American social and civic life.”<sup>197</sup> United States immigration law does not expressly include integration policies or mechanisms, though informal, limited and fragmented mechanisms, such as access to state identification cards and driver’s licenses, funding for post-secondary education, and English-language programs exist outside of federal immigration law to facilitate some degree of integration.<sup>198</sup> Integration is rhetorically understood to

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<sup>195</sup> Contemporary scholars, such as Ingrid Eagly, have critiqued the limits of the rhetorical and real usefulness of the integration model. See Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. 245 (2016).

<sup>196</sup> *Racial Realism*, *supra* note 5, at 378.

<sup>197</sup> *Immigrant Integration*, MIGRATION POLICY INSTITUTE, <http://www.migrationpolicy.org/topics/immigrant-integration> (defining immigrant integration as “the process of economic mobility and social inclusion for newcomers and their children including early childhood care, educational opportunities, workforce development, and healthcare); see also, *Guest Workers and Integration*, *supra* note 7, at 222 (discussing the problematic nature of guest worker or temporary worker programs in the context of immigrant integration).

<sup>198</sup> See Markowitz, *supra* note 7 (discussing how recently “immigrant advocates have begun looking to the power or inclusive state citizenship schemes to reorient our nation’s immigrant conversation); Kenneth Stahl, *Municipal Suffrage, Sanctuary Cities, and the Contested Meaning of Citizenship*, HARV. L. REV. BLOG (Jan. 1, 2018), <https://blog.harvardlawreview.org/municipal->

be a societally worthwhile goal in a liberal democracy, particularly where immigration, within and outside of the law, is both necessary and likely to sustain economic progress nationwide.<sup>199</sup>

Integration is presumed to be important for social peace, fostering participation in the democratic process, and to honor integral constitutional equality principles. Even if integration may be essential to “promot[ing] social peace,”<sup>200</sup> the absence of social peace since the founding of the nation suggest that social peace (at least widespread) was either not necessarily one of the goals of the founders or a significant oversight. The way in which it has been discussed by political leaders has revealed what is most generously described as an inauthentic concern.<sup>201</sup>

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suffrage-sanctuary-cities-and-the-contested-meaning-of-citizenship/ (“the emergence of a postnational standard of citizenship has been profoundly destabilizing for many people. Although this standard strips away the accident of birth as a privileged status, it substitutes a new privileged status, that of mobility”—this principle, that certain shifts are happening naturally, this emergence of a postnational standard of citizenship seems to be occurring through somewhat organic societal shifts due to the way people live today, and while there may be backlash, similar to how a shift towards more public, consistent recognition of LGBTQ rights has seen resistance in the form of increased hate crimes, the gradual tectonic shift may slow. At the same time, given the history of the struggle for racial justice, change may require more active work rather than occurring solely through organic socio-political change).

<sup>199</sup> HOWARD CHANG, LAW AND ECONOMICS OF IMMIGRATION (Howard Chang ed., 2015); KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS (CRITICAL AMERICA) (2009); Howard Chang, *Economic Welfare and the Optimal Immigration Policy*, 145 U. PA. L. REV. 1147 (1997); Lauren Gilbert, *Citizenship, Civic Virtue and Immigrant Integration: The Enduring Power of Community-Based Norms*, 27 YALE L. & POL’Y REV. 335, 399 (2009) (evaluating the merits and exploring approaches to immigrant integration including critical assessments of different models of integration including, but not limited to multicultural accommodation); Kevin Johnson, *Trump’s path to citizenship for 1.8 million will leave out nearly half of all Dreamers*, THE CONVERSATION (Jan. 30, 2018), <https://theconversation.com/trumps-path-to-citizenship-for-1-8-million-will-leave-out-nearly-half-of-all-dreamers-90899>.

<sup>200</sup> *Guest Workers and Integration*, supra note 7, at 229; see also William Bradford, “*With A Very Great Blame on Our Hearts: Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*,” 27 AM. INDIAN L. REV. 1, 92 (2003) (discussing the problems of “the nature of and remedy for minority disenfranchisement, the adequacy of existing civil rights legislation and liberal legal aspirations, the constitutionality of group entitlements, the ideal racial distribution of economic and social power,” and the “attainment of racial justice” to create and preserve social peace); Father Robert A. Sirico, *Civil Rights and Social Cooperation*, 10 REGENT U. L. REV. 11, 12 (1998) (arguing that social peace is an enviable goal requiring a new intellectual consensus on what constitutes civil rights); see also Matthew J. Lindsay, *How Antidiscrimination Law Learned to Live with Racial Inequality*, 75 U. CIN. L. REV. 87, 91 (2006) (referencing U.S. DEPT. OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION) (arguing “that not only is colorblind competition a poor remedy for the ongoing effects of past racial subordination; it is an implausible, and even counterproductive, antidote for the reproduction of racialism itself”).

<sup>201</sup> William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2005 (2008) (citing Dan T. Carter, *Legacy of Rage: George Wallace and the Transformation of American Politics*, 62 J. S. HIST. 3, 11 (1996) (quoting Wallace)) (internal quotation mark omitted) (discussing the “social peace” by Alabama Democrat George Wallace—who in the face of race riots “bragged about Alabama’s version

Still, scholars grapple with the meaning and possibility of greater equality and integration within the existing system. Scholar Hiroshi Motomura has carefully examined the role of integration and urged the importance of recognizing immigrants as potential future citizens, or “citizens in waiting” because, optimistically, if not touched by the crimmigration system and able to otherwise find a path to legal status, the “newcomer will belong someday.”<sup>202</sup> Yet, until they become future citizens from an immigration law standpoint, capitalism plays a role in creating a shadow population of undocumented resident aliens that provide cheap labor and do not benefit from rights and protections enjoyed by citizens.<sup>203</sup>

This exclusion and exploitation creates a permanent underclass, and is at odds with the equality principle logic of the *Plyler v. Doe* decision. However, throughout the history of U.S. immigration law, some immigrants, those of European descent, have been treated as Americans in waiting.<sup>204</sup> Settler colonialism and racial realism provide an explanation of why this is true, and why the systems of power have maintained this discrepancy in racialization with respect to who is treated as an American in waiting. Thus, the rationale of *Plyler* and constitutional equality principles may have a continuous thread throughout constitutional jurisprudence, but they have always hit brick walls. Crime control’s colorblind function as a proxy for immigration regulation,<sup>205</sup> and criminal law and crimmigration serving as proxies or tools for racial classification and control, undermine equality, and have roots deeper than *Plyler v. Doe*.<sup>206</sup>

Inequality can manifest in various forms and practices—immigrant covering is one such manifestation highlighting the incompleteness of systems of integration. As Stella Elias-Burch describes, “covering” is what occurs when immigration laws may promote some form of “covering” or “passing” as a full member or socio-political participant, such as a state providing the opportunity to obtain driver’s

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of social peace: ‘They start a riot down here, first one of ‘em to pick up a brick gets a bullet in the brain’).

<sup>202</sup> See Hiroshi Motomura, *Choosing Immigrants, Making Citizens*, 59 STAN. L. REV. 857, 869–70 (2007); see also HIROSHI MOTOMURA, AMERICANS IN WAITING 86 (2006); *Who Belongs?: Immigration Outside the Law and the Idea of Americans in Waiting*, *supra* note 7, at 361 (setting forth “an analytical framework that shows how viewing immigrants—including unauthorized migrants—as Americans in waiting is essential to reconciling the tension between national borders and a sense of justice that is defined largely by a national commitment to equality” in the context of historical U.S. immigration law).

<sup>203</sup> See generally JOSEPH NEVINS, OPERATION GATEKEEPER: THE RISE OF THE “ILLEGAL ALIEN” AND THE MAKING OF THE U.S.-MEXICO BOUNDARY (2002) (discussing the rise in undocumented migration); see also DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY (2007) (discussing of the U.S. immigration system as one of social control post-entry, including, but not limited to use and exploitation of undocumented migrants for their labor).

<sup>204</sup> AMERICANS IN WAITING, *supra* note 202, at 89.

<sup>205</sup> *Managing Migration Through Crime*, *supra* note 71.

<sup>206</sup> Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 113–14 (2012).

licenses, or other infrastructural invitations to partial engagement in society, though the ability to integrate is still incomplete. Thus, covering itself underscores the systemic failure of integration which cause this phenomenon.<sup>207</sup> Whether the reasons for encouraging and creating infrastructure to integrate are moral, ethical, political, social, or other, the use of criminality in determining fitness for integration is conceptually flawed and incompatible with fostering integration potential because it is bound up in racialization.<sup>208</sup> It is also an extension and continuation of settler colonialism.

While assimilation has a more express philosophy of submission and unequal power dynamics, integration and assimilation present a distinction with little difference. The similarity of these two terms highlights the historic and systemic context of the problem and the need to ask different questions, informed by the theories of racial realism and settler colonialism.<sup>209</sup> One way to characterize

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<sup>207</sup> Stella Burch Elias, *Immigrant Covering*, 58 WM. & MARY L. REV. 765, 855 (2017) (discussing immigration law and policy roles in “immigrants’ experiences of sociocultural assimilation into mainstream U.S. society may involve conversion, passing, or covering” and evaluating the normative advantages and limitations of this phenomenon); see Markowitz, *supra* note 7 (“explor[ing] the outer boundaries of state and local efforts to help integrate undocumented persons in the absence of Congressional immigration reform”); see also D. Carolina Núñez, *Mapping Citizenship: Status, Membership, and the Path in Between*, 2016 UTAH L. REV. 477 (2016) (reconceptualizing citizenship by decoupling substantive and formal citizenship to consider concepts of prescriptive and predictive citizenship in the context of birthright citizenship challenges and legalization and paths to citizenship for DREAMers).

<sup>208</sup> See, e.g., K. ANTHONY APPIAH, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS* 101, 113 (2006) (considering the value of cultural influences or “contamination” regarding the relationship between mass culture on local traditions; concluding in part that “a homogeneous system of values” is not needed to “have a home. Cultural purity is an oxymoron.”).

<sup>209</sup> See, e.g., RICHARD ALBA & VICTOR NEE, *REMAKING THE AMERICAN MAINSTREAM: ASSIMILATION AND CONTEMPORARY IMMIGRATION* 17–66 (2003) (describing and critiquing various assimilation theories); *THE NEW IMMIGRATION: AN INTERDISCIPLINARY READER* (Marcelo M. Suárez-Orozco, Carola Suárez-Orozco & Desirée Baolian Qin eds., 2005); see also, *Assimilation and Language*, PEW RESEARCH CENTER, HISPANIC TRENDS (March 2004), <http://www.pewhispanic.org> (last visited May 10, 2018) (“assimilation is now broadly accepted as a way to describe the ways that immigrants and their offspring change as they come in contact with their host society”); see also Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CALIF. L. REV. 863 (1993); Kevin R. Johnson & Bill Ong Hing, *National Identity in A Multicultural Nation: The Challenge of Immigration Law and Immigrants*, 103 MICH. L. REV. 1347 (2005) (critique of Samuel Huntington’s book “Who Are We?: The Challenges to National Identity”); Kevin R. Johnson, “Melting Pot” or “Ring of Fire”? *Assimilation and the Mexican-American Experience*, 85 CALIF. L. REV. 1259 (1997); Andrew Tae-Hyun Kim, *Immigrant Passing*, 105 KY. L.J. 95 (2016) (theorizing DACA and DAPA as anti-discrimination policies with the potential to challenge an otherwise de facto passing regime in immigration enforcement); Rubén G. Rumbaut, *Assimilation’s Bumpy Road*, in *AMERICAN DEMOCRACY AND THE PURSUIT OF EQUALITY* (Merlin Chowkwanyun & Randa Serhan eds., 2011) (considering the problematic nature of the term “assimilation” due to its masking or minimizing structural inequities and addressing language acquisition and social mobility in immigrant integration).

immigrant integration as allegedly distinct from assimilation<sup>210</sup> is that it does not expressly nor explicitly require the erasure of one's history, culture, or language, but instead concerns the ability to achieve levels of socio-economic and educational attainment of the settler class.<sup>211</sup> Assimilation is more directly perceived as tied to race, or the requirement that the individual being assimilated attempt to purge aspects of their identity to instead assume a new one, in the model of the receiving, or settler class.<sup>212</sup> Yet, racialization appears to be the cause and result of integration prohibitions, not unlike the portrayals of immigrants characterized as unassimilable.

In response to the absence of federal immigration reform expanding avenues to immigrate and rights for noncitizens, states and localities have legislated where possible. Immigration scholar Ingrid Eagly examines the shortcomings of viewing immigrant equality through the immigrant integration methodology, in spite of some of the positive impacts of pro-immigrant state and local immigrant integration policies.<sup>213</sup> She identifies two intersecting aspects of immigrant equality relevant to criminal justice—the first being equality in criminal justice outcomes irrespective of

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<sup>210</sup> See, e.g., Enid Trucios-Gaynes, *The Legacy of Racially Restrictive Immigration Laws and Policies and the Construction of the American National Identity*, 76 OR. L. REV. 369, 371 (1997) (discussing “immigration policy and the sub-text of race relations . . . premised on the idea that noncitizen newcomers to the United States have altered the American national identity and that these new members must be “assimilated” into American culture” with assimilation “as a requirement for full participation in the U.S. polity”—a theory” that is explicitly or subterraneously used to assess the integration of all groups of color regardless of citizenship status. This assimilation requirement is based on an immigrant analogy that underlies much of the political discourse about race and race relations in this country, and has been constructed to exclude all persons of color in the United States who are deemed incapable of assimilating. The reliance on assimilation as an underlying theme for race relations discourse ignores the other possible themes for constructing an American character such as cultural pluralism, transnational multiculturalism, or radical pluralism.”) (highlighting the historical legacy of racial restrictions in immigration law and policy, and the continuing use of a racially restrictive assimilation theory to perpetuate a fundamentally flawed view of the American national identity.”); see also Hadel Mohamed, *How Whiteness is Preserved: The Racialization of Immigrants & Assimilation in Education* (Nov. 11, 2017) (M.A. Capstone, SIT Graduate Institute) (on file with SIT Digital Collections, SIT Graduate Institute) (discussing harms of assimilation, considering role of immigration laws and educational systems in preserving Whiteness, and providing suggestions to educators to address the problem).

<sup>211</sup> Cristina M. Rodríguez, *Latinos and Immigrants*, 11 HARV. LATINO L. REV. 247 (2008); *Tales of Color and Colonialism*, *supra* note 12, at 28–30 (defining “settler class” as “those who came with or have adopted the presumption that this is *their* society”).

<sup>212</sup> Hing, *supra* note 191, at 870 (suggesting that in the context of the 1992 presidential campaign, the “thrust of [] assimilation” claims “collapse[] into a racial claim because Asian and Latino immigrants, who constitute the majority of today’s immigrants, do not come from a Western European racial or cultural heritage.”).

<sup>213</sup> See Eagly, *supra* note 195, at 295 n.271. Eagly and others have critiqued the limits of the rhetorical and real usefulness of the integration concept. Yet at the same time, scholars addressing the importance of state integrative and protective policies are careful not to over-state the effectiveness of such policies in disrupting racialization and implicitly, the extensive reach of settler colonial institutions. I do not mean to suggest that such policies, or discussions thereof, are not pragmatic and important.

immigration status, and the second, “equal treatment along racial and ethnic lines.”<sup>214</sup> Eagly suggests that “immigrant equality entails greater attention to the ways in which immigration policing can shift the priorities and practices of the criminal law in ways that promote and disguise profiling of Latinos . . . and other people of color and deeper investigation of racially and ethnically disparate treatment in prosecution and punishment . . . promoted by seemingly race neutral immigration enforcement practices.”<sup>215</sup> While Eagly’s focus is on the criminal justice and crimmigration systems, her findings have implications beyond equal treatment along ethnic and racial lines in criminal law and crimmigration, reaching into the vast and complex terrain of integration. While there have been some measures taken to attempt to address the problem of unequal treatment in criminal law,<sup>216</sup> the systemic inhibitors are rooted in settler colonial history and well-established.

Linking immigration removals to alleged criminal activity or interaction with the criminal justice system has disparate impacts on racialized immigrants of color.<sup>217</sup> The role of the criminal justice system as a racialized system of control reinforces narratives that justify or provide reasonable explanations based on neutral factors (as if criminality were not a product of a racialized system and the criminal is inherently flawed) whereby factors other than race or immigration status can be blamed for failure to integrate.

Racialized immigration enforcement can impact not only immigrants, but also citizens who are “racialized,” including citizens who “are bilingual speakers, have friends or family members who are immigrants, or who engage in certain cultural practices.”<sup>218</sup> This reality demonstrates the relevance of settler colonialism and racial realism, including the limitations of the existing racial remedies. The institutional structures of governing prevent the possibility of equal treatment along

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<sup>214</sup> Eagly, *supra* note 195, at 295 n.271 (citing Lucas Guttentag, *Introduction, Immigration Reform: A Civil Rights Issue*, 3 STAN. J. C.R. & C.L. 157, 158 (2007)) (“As Lucas Guttentag has argued, ‘immigration law and policy cannot be divorced from issues of race, national origin, ethnicity, and color.’”).

<sup>215</sup> Eagly, *supra* note 195, at 296 n.274 (citing Douglas S. Massey & Karen A. Pren, *Origins of the New Latino Underclass*, 4 RACE SOC. PROB. 5, 6 (2012)) (“As Douglas Massey and Karen Pren have shown, Latinos in the United States now have the highest concentration of undocumented immigrants of any group in the United States, making Latinos “now the most vulnerable of all of America’s disadvantaged populations.”).

<sup>216</sup> *Id.* at 305 (citing Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 821, 824 (2013)) (explaining that scholar activist Angela Davis’s “work on American prosecutors has revealed that routine charging and plea-bargaining practices can perpetuate racial disparity in the criminal justice system” and notes that Davis argued that a model for reform is to work with prosecutors to “analyze the racial impact of their decisions at various points of the process” and to draft new charging practices that remedy any identified racial disparities”).

<sup>217</sup> See, *supra* section III.

<sup>218</sup> See Romero, *supra* note 75, at 451 (contending that immigration raids are a policing practice that maintains and reinforces the subordinated status of Latinos).



racial and ethnic lines. The narrative of criminality, and its consequences, cross lines of immigration status and touch immigrants, Afrodescendant peoples, and all persons perceived as persons of color.

The significance of the criminal and immigration systems intertwining is not only that they both concern questions of membership, but similarly, they both require the same solution of examining the root causes of the inequity experienced by all communities of color impacted by the criminal justice system, regardless of immigration status.<sup>219</sup> Race is the often-overlooked issue in immigration, and crimmigration, which magnifies the need for racial realism.<sup>220</sup> Thus scholars like Natsu Taylor, Kelly Lytle Hernández, and Jennifer Chacón offer more complex and suitable methodologies to address crimmigration as a structural tool of settler colonialism—historically designed and continually employed to contain,<sup>221</sup> eliminate, and exclude.

## 2. Membership—Earned Citizenship as Another Tool Reinforcing Racialization, Difference, and Exclusion

Scholar Muneer Ahmad's consideration of the rhetorical and political transition in recent years from legalization of undocumented persons, to "earned citizenship," requiring certain economic, civic, and cultural achievement, is helpful in considering the questions of crimmigration and the failure of integration, even if such considerations of achievement do not always expressly address the systems designed to differentiate, confine and control.<sup>222</sup> Ahmad critiques earned citizenship, or paths to legal residency and citizenship, from the perspectives of policy, morality, politics, and law, and suggests that "earned citizenship suffers from serious, previously unaddressed theoretical and conceptual flaws that illuminate and imperil our larger understandings of citizenship"<sup>223</sup> although the imperiled definition of citizenship is as old as the founding of the nation and the origins of laws restricting migration.

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<sup>219</sup> Stumpf, *supra* note 1, at 396 (discussing how immigration and criminal law play a core role in serving as "gatekeepers of membership in our society" and determine inclusion or exclusion).

<sup>220</sup> Kevin R. Johnson, *A Case Study of Color-Blindness: The Racially Disparate Impacts of Arizona's S.B. 1070 and the Failure of Comprehensive Immigration Reform*, 2 U.C. IRVINE L. REV. 313, 358 (2012) (criticizing the fact that race is usually "buried in the discussion" on immigration reform); see also Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525, 528–29 (discussing the lack of consideration of race in modern immigration legal scholarship).

<sup>221</sup> Literal, physical containment, as well as the containment, or curtailment of formal and legitimate political power—immigration policies that exclude Latinos have direct consequences on the future of Latino/a voting. See Paul Grossinger, *Harsh Drug and Immigration Policy is Just Voter Suppression Disguised*, HUFFPOST (Mar. 16, 2017), [https://www.huffingtonpost.com/entry/harsh-drug-and-immigration-policy-is-disguised-voter\\_us\\_58c98e29e4b039fbadeb1f2f](https://www.huffingtonpost.com/entry/harsh-drug-and-immigration-policy-is-disguised-voter_us_58c98e29e4b039fbadeb1f2f).

<sup>222</sup> Muneer I. Ahmad, *Beyond Earned Citizenship*, 52 HARV. C.R.-C.L.L. REV. 257 (2017).

<sup>223</sup> *Id.*

Earned citizenship is a way in which membership is controlled by the settler class and is a function of colorblind white dominance.

While not explicitly focused on the relationship between the criminal justice system's role in racialization underlying the question of immigrant integration, Ahmad's examination of the notion of moving beyond earned citizenship<sup>224</sup> raises questions relevant to the conversation about crimmigration's relationship to integration. While the means of obtaining U.S. citizenship as a matter of law—*jus soli* and *jus sanguinis*, by blood or birth—appear to omit racialization and are facially race-neutral, systemic inequity pervades the legal and metaphorical citizenship/membership process.<sup>225</sup> Similarly, crimmigration is facially race-neutral, yet marked by implicit racialization, and indirectly responsible for socioeconomic inequities.

Legalization, particularly when framed as “earned” citizenship rather than amnesty, reinforces the good/bad immigrant false dichotomy, and serves the racializing function of the criminal and criminal-immigration systems, making fuller and more equitable integration less achievable. It also legitimizes the existing system because, by definition, some are not worthy of citizenship because they cannot integrate, and they cannot integrate because they are not, and cannot be citizens (or legal residents).<sup>226</sup> Assimilation and integration are both equally, perpetually, just out of reach. Like Linda Bosniak states, “territorially present status non-citizens” are in a form of limbo as both “product and precondition of the operation of state borders.”<sup>227</sup> Just as importantly, socio-political structures are designed to create a permanence in a certain kind of noncitizen status.<sup>228</sup>

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<sup>224</sup> *Id.*

<sup>225</sup> See Naturalization Act of 1790, 1 1st Cong., 1 Stat. 103 (1790) (repealed by the Act of January 19, 1795, which re-enacted most of its provisions, including its racial restrictions) (making it so all People of Color were precluded from obtaining citizenship via naturalization until 1952, after the “free White person” requirement was eliminated); see Act of July 14, 1870, 41st Cong. § 7, 16 Stat. 254 (1870) (Following passage of the Fourteenth Amendment, this provision was modified to allow the naturalization of “persons of African descent.”); Immigration and Nationality (McCarran-Walter) Act, 82nd Cong. Ch. 477, 66 Stat. 163 (1952) (racial restriction was removed); see U.S. CONST. amend. XIV, § 1 (providing that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside”).

<sup>226</sup> See, *Tales of Color and Colonialism*, *supra* note 12, at 29 (proposing that “[o]ur very presence as non-Indigenous peoples can serve to legitimize settler society and its occupation of Indigenous lands” while “struggles to remediate disparities between the settler class and non-Indigenous Others run the risk of rendering settler colonial institutions invisible while simultaneously reinforcing them”).

<sup>227</sup> Linda S. Bosniak, *Status Non-Citizens*, in THE OXFORD HANDBOOK OF CITIZENSHIP STUDIES (Ayelet Shachar, Rainer Bauböck, Irene Bloemraad & Maarten Vink eds., 2017).

<sup>228</sup> Bosniak previously explored the relationship between “immigrant policy and immigration policy,” including when they converge “where government employs immigrant policy in the service of immigration policy” such as “Proposition 187; exclusionary immigrant policy is treated by the state of California ... as just another front in the “border war” against illegal immigration.” *Immigrants, Preemption and Equality*, *supra* note 7, at 199.

Similar to the way in which in a “liberal democracy, neither inheritance nor luck should determine rights or life outcomes,” perceived race and immigration status do, but should not determine integration, at least from a moral or ethical standpoint.<sup>229</sup> The seemingly moral arbitrariness of the role of race and immigration status in integration is more significant than citizenship by birth or blood, and is equally, or possibly more, morally culpable. The legacy of racial disparity and harms distributed along lines of race in the United States is a distinct, but still unresolved problem, and at odds with at least some aspirational notions of a liberal democracy. Ahmad’s proposal of “levelling up” or narrowing of the gap between earned and unearned citizenship, and eliminating the “earnings regime” in favor of liberalizing the grounds for legalization, is a worthwhile proposal to begin to address the so-called integration problem, or persistence of inequality.<sup>230</sup>

More precisely, he suggests “[a] focus on caste forces consideration of the current [and historic] realities of racialized inequality” and “maintenance of an equality regime, for the enjoyment of all citizens, depends on the elimination of caste” but, he suggests, “[t]he coexistence of citizenship and caste is the destruction of citizenship itself.”<sup>231</sup> This perspective seems dependent on an optimistic equality-minded definition of citizenship, one the settler colonial class may not have intended. Perhaps instead, the inverse may be true, and the elimination of caste cannot occur without destruction or drastic reconfiguration of the definition of citizen. Motomura’s “citizens in waiting” concept similarly helps reframe the way in which noncitizens are portrayed as worthy of fuller membership and can draw attention to the catch-22 and circularity of the dynamic of racialization—deeming the racialized person as inherently criminal, and unassimilable, and simultaneously unworthy and unassimilable because of their racialized characteristics.<sup>232</sup>

Immigration law itself, to the extent that it creates means for exclusion and limited paths to remain in the United States, serves to legitimize settler society.<sup>233</sup> Humans as a species have been nomadic since the beginning of time, and their movement did not become characterized as “migration,” and, consequently, they did not become characterized as “immigrants,” until fairly recently.<sup>234</sup> The shift

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<sup>229</sup> Ahmad, *supra* note 222, at 291.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 304.

<sup>232</sup> AMERICANS IN WAITING, *supra* note 202, at 89.

<sup>233</sup> See Peter H. Schuck, *Perpetual Motion*, 95 MICH. L. REV. 1738, 1738 (1997) (“Intercontinental migrations of this kind, of course, have proceeded ever since the first communities dispersed by foot across the globe in search of food, water, land, and security”).

<sup>234</sup> See Hernández, *supra* note 86, at 276 (discussing the role of immigration laws and imprisonment in subordinating Mexican and Central American migrants) (“migrant groups that comprise substantial portions of the current immigration prison population have likewise been exploited for the benefit of the United States” and “since the 1960s, the United States has also created a legal regime in which migration is perilous and migrants are marginalized” and describing the

from what was known as migration to immigration corresponded with shifts in power dynamics and the increased significance of borders and sovereignty, and arose from settler colonialism.<sup>235</sup> Today, during a continuing international refugee crisis, migration has been urged by human rights advocates to be perceived as a human right, where flight is often necessitated by global political factors outside of the control of individuals, and caused, or furthered, by global capitalism. Yet even more broadly, the notion of immigration itself invisibly facilitates othering and exclusion. As César Cuauhtémoc García Hernández proposes, “[a]n alternative moral vision of migrants would require that imprisonment for migration-related activity turn on a person’s participation in immoral conduct rather than on her citizenship status.”<sup>236</sup> A similarly nuanced understanding of the role of racialization in regulating migration via crimmigration could be more productive than existing, limited race-neutral or colorblind immigration policies.

Ahmad discusses measures like revising “earned citizenship” by eliminating components such as the civics and English-language requirements. Doing so would decrease normative “assimilationist demands for a particular aesthetic” presumably coded as “White,” of belonging.<sup>237</sup> While there are practical reasons for the language requirement, including participation in the civic life of U.S. democracy, as Ahmad explains, these requirements are also a proxy for assimilation more deeply than this superficial requirement suggests.<sup>238</sup> Changes to the earned citizenship process are limited incremental changes. Revisions to earned citizenship or the exclusion and removal process may be more effective if they were to also take into account the racialization of the criminal justice and crimmigration systems.

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necessity of “craft[ing] an alternative moral framing of migrants and migration from which democratic institutions can rise that do not use state violence as a means of social control”).

<sup>235</sup> See, e.g., David C. Baluarte, *Two Steps Back: A Comparative Analysis of the “Right to Migrate” in Argentina* (forthcoming 2018) (examining the durability of the right to migrate under Argentina’s new Decree law, and examining whether the Argentina limits on migration to the U.S. model of immigration regulation, which may conflict with human rights standards and international law, and undermine equal rights for migrants); see also Ai Weiwei, *The refugee crisis isn’t about refugees. It’s about us*, THE GUARDIAN (Feb. 2, 2018), [https://www.theguardian.com/commentisfree/2018/feb/02/refugee-crisis-human-flow-ai-weiwei-china?CMP=Share\\_AndroidApp\\_Tweet](https://www.theguardian.com/commentisfree/2018/feb/02/refugee-crisis-human-flow-ai-weiwei-china?CMP=Share_AndroidApp_Tweet); Anis Shrivani, *A radical new approach to the immigration ‘problem’: Full human rights*, SALON (Oct. 1, 2017), <https://www.salon.com/2017/10/01/a-radical-new-approach-to-the-immigration-problem-full-human-rights/>.

<sup>236</sup> Hernández, *supra* note 86, at 294.

<sup>237</sup> Ahmad, *supra* note 222, at 286 (citing MILTON M. GORDON, *ASSIMILATION IN AMERICAN LIFE: THE ROLE OF RACE, RELIGION, AND NATIONAL ORIGINS* (1964)) (“I use the term assimilation to denote the adoption of dominant social and cultural practices as a means of incorporation into a community or society.”).

<sup>238</sup> *Id.* at 279 (citing Friso van Houdt, Semin Suvarierol & Willem Schinkel, *Neoliberal Communitarian Citizenship: Current Trends Towards ‘Earned Citizenship’ in the United Kingdom, France and the Netherlands*, 26 INT’L SOC. 408, 425 (2011)) (“Earning one’s citizenship then amounts to a thoroughly individualized cultural conversion to the communitarian ideal of a nation defined by a bounded set of values.”).

Crimmigration reforms, within the existing system, like revising the INA to end detention absent a serious or violent felony, eliminating aggravated felony designations, eliminating mandatory detention, and bringing back INA § 212(c)<sup>239</sup>, could foster integration.<sup>240</sup> Treating immigrants as “citizens in waiting” similarly has equalizing and integrationist potential. These views paint one part of the broader picture, though that picture is filled in more fully by the language and architecture of settler colonialism and racial realism.

If, as Michelle Alexander contends, the modern criminal justice system is an intentionally racialized means of social control and is designed to perpetuate inequity, then equality, and the integration that precedes it, necessitates a re-thinking of the criminal justice and crimmigration systems even more broadly. Immigration policy and enforcement expands and perpetuates “racial inequality and ‘colorblind white dominance,’”<sup>241</sup> further preventing integration along lines of race and immigration status.

Scholar Alina Das is one of a handful of scholars urging that “the success of any call for inclusive immigrant justice requires more than a critique of the modern merger of the immigration and criminal legal system” and urges the examination of the historic “interconnected, symbiotic relationship between racism, criminalization,

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<sup>239</sup> INA § 212(c) had allowed immigration judges to consider rehabilitation and community ties of certain immigrants otherwise subject to deportation stemming from criminal activity. The 1996 legislation eliminated this form of relief and increased the criminal offenses resulting in mandatory removal or deportation.

<sup>240</sup> See Bill Ong Hing, *Re-Examining the Zero-Tolerance Approach to Deporting Aggravated Felons: Restoring Discretionary Waivers and Developing New Tools*, 8 HARV. L. & POL’Y REV. 141, 142 (2014) (arguing that “immigration judges should regain discretion over deportation cases involving lawful permanent resident immigrants who have committed aggravated felonies—discretion that was eliminated in 1996”); see also Jason A. Cade, *Judging Immigration Equity: Deportation and Proportionality in the Supreme Court*, 50 U.C. DAVIS L. REV. 1029 (2017) (examining the “Court’s general gravitation toward proportionality analysis” in spite of the elimination of INA section 212(c)); Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TUL. L. REV. 1 (2014) (arguing that “the removal system lacks serious structural features to ensure . . . obligations” to consistently exercise discretion are met” in the face of a “categorically unforgiving nature of the modern statutory removal scheme” such that the immigration system should look to the criminal justice system for ways to incorporate discretion to avoid asymmetries and unjust results); Maritza I. Reyes, *Constitutionalizing Immigration Law: The Vital Role of Judicial Discretion in the Removal of Lawful Permanent Residents*, 84 TEMP. L. REV. 637 (2012) (arguing “that . . . constitutional, historical, theoretical, societal, and humanitarian policy considerations underlying sentencing and removal support the return of judicial discretion to the removal proceedings of longtime lawful permanent residents”); see also Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 662 (2015) (proposing the “reinvigoration of adjudicative discretion and rollback of overly broad removal grounds through statutory reform”).

<sup>241</sup> *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, *supra* note 1, at 606–07 (2015) (quoting WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE, *supra* note 13, at 147–48).

and deportation.”<sup>242</sup> Addressing the social, political, economic, and all simultaneously racialized means of inequity could be seen as the cause, rather than the effect, of the failure of integration.

As succinctly described by Ahmad, undocumented persons are “racially marked, disproportionately poor, categorically disenfranchised, systemically discriminated against, and relegated by law to the absolute margins of the economy. These are the hallmarks of caste.”<sup>243</sup> Caste and its concomitant problems are not novel, accidental, or solely relegated to distant lands. This caste-like system is indicative of settler colonialism, and makes more sense when viewed through the lens of racial realism.<sup>244</sup> This same caste demarcation is evident when examining disparities, not just amongst undocumented and documented immigrants, or even all immigrants, but generally among people racialized as nonwhite in the U.S.<sup>245</sup> The focus on caste “forces consideration of the current realities of racialized inequality”<sup>246</sup> and compliments this discussion of crimmigration, immigrant integration, and settler colonialism.

While the relationship between crimmigration and immigrant integration is illuminated by considering the problematic nature of “earned citizenship,” membership theories, and equality, all of these concerns require examination through the combined methodologies of racial realism and settler colonialism. This macro focus is necessary to the extent that existing legal structures are destined to always fall short in fostering integration, in part because “integration” is the perhaps not the most befitting term in examining the deeper issues at play.

### 3. The Return to Racist and Racialized Dehumanizing Policies Propping Up Vestiges of Settler Colonialism

The current Administration’s immigration policies are a testament to the power of settler colonialism despite the perception of democracy as encompassing equality. In addition to democracies’ failure to do away with the infrastructure and tools of settler colonialism, the condition of democracies nationally and internationally are increasingly perceived as tenuous.<sup>247</sup> The policies of the sitting president, which are supported by a majority of Republicans at the time of this writing, would shift ethnic and racial composition of the United States population skewing racialized demographics in favor of the settler class by disrupting the somewhat natural flow

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<sup>242</sup> Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. (forthcoming 2018).

<sup>243</sup> Ahmad, *supra* note 222, at 303

<sup>244</sup> Ahmad, *supra* note 222, at 303; *Racial Realism*, *supra* note 5.

<sup>245</sup> See, *supra* section II.

<sup>246</sup> Ahmad, *supra* note 222, at 304.

<sup>247</sup> Gideon Rose, *Is Democracy Dying?*, FOREIGN AFF. (May/June 2018), <https://www.foreignaffairs.com/articles/2018-04-16/democracy-dying>.

of migration.<sup>248</sup> The relative social and political tolerance of inherently racist deterrent immigration policy of separating children from parents seeking asylum at the border and incarcerating children, either alone or with families,<sup>249</sup> is a warning about the persistence of settler colonialism. Even if they once again become stronger, the institutions of North American democracy are unlikely to serve equality in the face of these inhumane policies now, or in the foreseeable future.

What may be most valuable in considering immigrant integration, race, and the function of equality is the idea that “[u]nless some distortion [here, immigrant integration] is perceived to be introduced by impermissible bias, the state is not accountable . . . [t]he formal equality model . . . fails to take into account existing inequality . . . [and] fails to disrupt persistent forms of inequity.”<sup>250</sup> Because the notion of equality contemplated by and in the current system is limited to sameness of treatment, American society is able to continue to be perceived as equal enough, without any guarantee of access to basic necessities like food, shelter, and health care. Instead, the system tolerates significantly unequal distribution of wealth, as well as opportunity, including opportunity to stay out of prison, and to integrate, as far as obtaining a relative level of wealth, power, and opportunity. Systems that further realize the possibility of self-determination may have the best chance at moving past the otherizing language of integration and achieving something new and different, beyond the original, at times shallow, tenants of democracy.

If viewed from the lenses of racial realism and settler colonialism, it becomes clearer that the question to ask is not why immigrants have not more successfully integrated, but how to address the structural mechanisms designed to literally and metaphorically keep them in their socio-economic, unequal, and unintegrated place.

## II. CONCLUSION

When examining the principles underlying the theory and mechanisms of integration pursuant to racial realism and settler colonialism, it becomes clearer that integration was never intended to be achieved by any people racialized as nonwhite, irrespective of whether one is a citizen or immigrant. The criminal justice system plays a role in racialization, irrespective of United States citizenship status, impacting U.S. citizens and all people racialized as nonwhite in the United States.

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<sup>248</sup> Jeff Stein & Andrew Van Dam, *Trump immigration plan could keep whites in U.S. majority for up to five more years*, THE WASH. POST, [https://www.washingtonpost.com/news/wonk/wp/2018/02/06/trump-immigration-plan-could-keep-whites-in-u-s-majority-for-up-to-five-more-years/?utm\\_term=.cec9b64ef006](https://www.washingtonpost.com/news/wonk/wp/2018/02/06/trump-immigration-plan-could-keep-whites-in-u-s-majority-for-up-to-five-more-years/?utm_term=.cec9b64ef006) (discussing what constitutes a “natural” flow of migration is a worthwhile discussion beyond the scope of this article, but would consider the role of globalization in migration patterns, and has been examined by others).

<sup>249</sup> Joel Lovell, *Can the ACLU Become the NRA for the Left?*, N.Y. TIMES (July 2, 2018), <https://nyti.ms/2lOCs2m> (discussing the policies, the impacts, and the ACLU’s work to attempt to use not just the courts, but the power of the people of a citizen democracy in resisting these immigration policies).

<sup>250</sup> Fineman, *supra* note 182, at 3.

By racializing, the criminal justice system serves an epistemological function signifying criminality as a marker of desirability for membership. Crimmigration serves a similar meaning-making role, interfering with citizens' and noncitizens' ability to enjoy the benefits of full participation in civil society.

Integration is an endlessly unattainable goal, by design. The failure of immigrant integration can be characterized as resulting from the challenges of adapting to a new culture, learning language, and striving towards economic goals. Yet this logic is an extension of the facially colorblind institutionalized systems of power that serve to erase the role of race in criminal law and in crimmigration. The failure of integration, and the inequities that impact all colonized peoples the United States, are manifestations of settler colonialism, and crimmigration is by and large one of its contemporary tools.

Considering crimmigration's compounding racialized difference through the framework of integration is fundamentally flawed because doing so suggests that it is possible to eliminate or counteract racism by integrating people racialized as nonwhite into an inherently white supremacist society. When considering criminality and crimmigration as an extension of settler colonialism, racial realism proposes a more honest and productive framework.